CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1928

No. 96

THE STATE HIGHWAY COMMISSION OF WYOMING, CONSISTING OF HYRAM LINGLE, T. D. O'NEIL, ET AL., PETITIONER,

vs.

UTAH CONSTRUCTION COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 20, 1928

CERTIORARI GRANTED APRIL 23, 1928

(33,304)

(33,304)

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[fol. a] [Caption omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT, DISTRICT OF WYOMING

[File endorsement omitted]

No. 1547. At Law, Civil

UTAH CONSTRUCTION COMPANY, a Corporation, Plaintiff,

vs.

THE STATE HIGHWAY COMMISSION OF WYOMING, Consisting of Hyrum Lingle, G. D. O'Neil, S. W. Conwell, J. M. Snyder, and Francis Johnstone, Defendant

WRIT OF ERROR AND CLERK'S RETURN—Filed Jan. 20, 1927

UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the Honorable Judge of the District Court of the United States for the District of Wyoming, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between Utah Construction Company, a corporation, plaintiff in error, and The State Highway Commission of Wyoming, defendant in error, a manifest error has happened to the damage of Utah Construction Company, a corporation, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the same at St. Louis, in the State of Missouri, where said court is sitting, and file in the office of the

Clerk of said Court within sixty days from the date hereof, in said Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Court of Appeals may cause further [fol. 2] to be done therein to correct the error what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States Supreme Court, this 20th day of January, A. D. 1927.

Issued at my office in Cheyenne, Wyoming, with the seal of the United States District Court, for the District of Wyoming, and dated as aforesaid.

Charles J. Ohnhaus, Clerk of the United States District Court for the District of Wyoming. (Seal U. S. Dist. Court, Dist. of Wyo.)

Allowed this 20 day of January, A. D. 1927.

T. Blake Kennedy, Judge of the United States District Court for the District of Wyoming.

UNITED STATES OF AMERICA,
District of Wyoming, ss:

In obedience to the Command of the within Writ, I herewith transmit to the United States Circuit Court of Appeals a duly certified transcript of the record and proceedings in the within entitled cause, with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of the United States District Court, for the District of Wyoming, at Cheyenne, in said District, this 12th day of March, A. D. 1927.

Charles J. Ohnhaus, Clerk of the United States District Court for the District of Wyoming. (Seal U. S. Dist. Court, Dist. of Wyo.)

[fol. 3] Citation, in usual form, showing service on Wm. O. Wilson and M. A. Kline, filed January 21, 1927, omitted in printing.

[fol. 4] IN UNITED STATES DISTRICT COURT

[File endorsement omitted]

[Title omitted]

SECOND AMENDED PETITION—Filed August 22, 1925

Comes now Utah Construction Company and by leave of court first had makes and files this its second amended petition; whereupon plaintiff alleges:

1. That during the times hereinafter mentioned plaintiff, Utah Construction Company, was and now is a corporation organized and existing under and by virtue of the laws of the State of Utah and was and is a citizen and resident of the State of Utah; and during such times was engaged in Wyoming in the business of constructing highways, in full compliance with the laws of Wyoming relating to foreign corporations doing business in such state.

2. That the said Hyram Lingle, G. D. O'Neil, S. W. Conwell, J. M. Snyder and Roy Seney are respectively the duly appointed, qualified and acting Highway Commissioners of *of* the State of Wyoming, and that collectively the said persons above named constitute the State Highway Commission of Wyoming with powers to sue and be sued under the provision of the statute of Wyoming in such case made and provided. That the said persons constituting the said State Highway Commission of Wyoming, and the said Commission is each a resident and citizen of the State of Wyoming.

3. That the matter and amount in controversy in this action, exclusive of interest and costs, exceeds the sum and value of three thousand dollars.

4. That the state highway engineer (hereinafter sometimes referred to as "the engineer") during the times here-[fol. 5] inafter mentioned was and is an appointee of the said State Highway Commission of Wyoming and of the state highway superintendent. That such engineer during the times hereinafter mentioned and for a long period prior thereto was authorized by such commission and superin-

tendent, through himself and district engineers and resident engineers acting in his behalf, to plan highways to be constructed under the authority of the said highway commission and to direct the construction thereof, to stake the location thereof and direct changes in the plans and method and means of construction of said highways. That substantially all of the work done in the field under the authority of said commission, in the way of surveying and constructing said highways, or superintending, overseeing and directing the construction thereof, was for many years prior to the making of the contract hereinafter named, and during all of such times as the construction work hereinafter mentioned was going on, performed (under the authority of said superintendent) by the said state highway engineer and by his assistant district and resident engineers.

5. That prior to June 1, 1922, the said state highway commission and the said superintendent caused to be surveyed through Goyne Drummond, a district superintendent, acting under the said state highway engineer, a certain proposed road and public highway extending along the course of Wind River in the Wind River Canyon in Fremont and Hot Springs Counties, Wyoming, to be known as the Wind River Canyon Road. That in making such survey the said district engineer and his assistants staked upon the ground the location of the said proposed road with the usual engineering stakes; and made certain official plans, cross-section drawings and notes [—] were duly filed in the office of the said state highway commission at Cheyenne, Wyoming, were approved by said commission and superintendent, and became a part of the public records of that office. Such survey will be hereinafter referred to as the "Drummond survey" and the line staked and designated in said survey will be referred to as the "Drummond Line."

6. That thereupon and on or about the month of May, 1922, the said state highway commission gave public notice for proposals to construct the said road and highway according to said survey, and plaintiff on or about June 1, 1922, made its proposals in writing to the said state highway commission to construct according to the provisions of a certain form of contract and specifications, all the grad-[fol. 6] ing, including all excavation and embankment and

culvert construction of Section B of said proposed road, consisting of 1.95 miles, and Section C., consisting of 9.47 miles of the said road, and Section D., consisting of two miles thereof, and that said bid and proposals of plaintiff was accepted by the said state highway commission as the lowest responsible bid for the work; and that thereafter and on or about the 3rd day of June, 1922, plaintiff made and entered into said written contract with the said state highway commission, by which it was agreed between the parties thereto that plaintiff (therein referred to as "the contractor") should, at its own cost and expense, do all work and furnish all labor, materials and tools, except such as were mentioned in the specifications to be furnished by the State of Wyoming, necessary to construct to the satisfaction of the said state highway engineer such portions of the said Wind River Canyon road, as were covered by the said proposals of plaintiff, constituting in all 13.42 miles, extending from what was known as Boysen dam to a certain bridge in Thermopolis, Wyoming, said road to be constructed in compliance with specifications attached to said contract and the plans of the Drummond line (shown to plaintiff prior to the time of signing the said contract), and in compliance with the requirements of the said state highway engineer given thereunder.

The said contract further provided that in consideration of the covenants of plaintiff therein made and the completion of the said work embraced therein according to the plans, specifications and conditions of the contract, the State of Wyoming would pay and the contractor should receive as full compensation for everything done and furnished by the contractor under such contract, the price stipulated in the proposals of petitioner. That such prices so agreed to be paid consisted of the following:

In Section B, consisting of 1.95 miles, for all backfill in rock cuts, of an approximate quantity of 2210 cubic yards, 35c per cubic yard; for all station overhaul on road bed excavation, estimated at 300 cubic yards, 16c per cubic yard; for all excavation and embankment in constructing the said section of said highway, the amount thereof being approximately estimated at 58,300 cubic yards, at a flat or unclassified rate of $1.50 per cubic yard; for all station overhaul or backfill in rock cuts, approximately estimated

at 50,000 cubic yards, at the rate of 2c per cubic yard. In addition thereto a rate was agreed upon for furnishing and installation of certain necessary culvert pipe, masonry, construction of tunnels and concrete culvert pipe and walls. [fol. 7] In the construction of Section C, consisting of 9.47 miles, backfill in rock cuts, a-proximately estimated at 10,790 cubic yards, was to be made and performed at the rate of 35c per cubic yard; station overhaul on road bed excavation, approximately estimated at 400 cubic yards, was to be made and performed at 16c per cubic yard; at approximately 212,000 cubic yards of material, was to be done at an unclassified or flat rate of 68½c per cubic yard; all station overhaul and backfill in rock cuts in said Section C approximately estimated at 108,000 cubic yards, was to be done at the rate of 2c per cubic yard. In addition thereto the furnishing and installment of necessary masonry and concrete [and] walls and culvert pipes was to be done at a certain specified rate.

That said Section D, was agreed to be constructed at a certain unclassified or flat rate for excavation and embankment of 18c per cubic yard.

A true copy of said contract together with the specifications and proposals therein referred to, is hereto attached, marked Exhibit "A" and made a part hereof.

That the official plans and profiles of the said Drummond line are in the possession of defendant and not in the possession of plaintiff; that plaintiff has no complete copy of the said official plans and the defendant has refused and refuses, although demanded so to do, to either furnish a copy of the same to plaintiff or to permit plaintiff to inspect the original plans or take a copy thereof. Therefore a copy of the same cannot be attached hereto.

7. That the official plans of the said Drummond line, at the time of the making of said contract, contained and now contain certain projections or suggested changes which might be made in the alignment and grades of the highway at certain points shown thereon by means of appropriate engineering lines and drawings, which changes would require an increased amount of excavation; such changes applied to only a small portion of said line and were in general minor in character. All of such projected changes are

shown upon the official plans in defendant's possession. For the purpose of effecting said changes as shown by said projections and also for the purpose of providing increased tunnel work, plaintiff on or about December 12th, 1922, after plaintiff had been constructing part of said road for approximately four months, entered into a supplemental agreement with defendant by which it was agreed that the increased yardage thus required should be done at the flat rate described in the original contract. A true copy of [fol. 8] said supplemental agreement is herewith attached, marked Exhibit B and made a part hereof.

8. Plaintiff commenced the construction of said highway on or about July, 1922, and continued its construction thereof until the same was completed to the satisfaction of defendant and its said superintendent and engineer on or about July 4, 1924, when the same was accepted and approved by defendant and thrown open to the public as a public highway. In the construction of said highway plaintiff followed the lines, grades and measurements laid out by the said state engineer acting through his assistants in the field, and relied upon such grades, lines and measurements as laid out as being substantially correct and accurate representations of the work to be done under such plans and minor changes provided for in said supplemental agreement, and actually believed such grades, lines and measurements so laid out to be substantially in accordance with said plans and supplemental contract. But plaintiff alleges that said lines, grades and measurements as laid out by said engineer and followed by plaintiff, were not correct and accurate and did not substantially follow the original plans or lines, or the said minor changes contemplated by said supplementary agreement but were laid out and staked substantially according to an entirely new survey which was done at the direction of said engineer and superintendent and approved by the defendant.

Plaintiff is informed and believes and so states the fact to be that during the year 1922, at a month unknown to plaintiff the said state engineer caused the said new survey to be commenced, thereafter conducted by two assistants in his office named respectively Corwine and Olson, and that said survey was finally completed and that the

plans thereof were approved on or about February 1, 1923, during the time plaintiff was engaged in said construction work. That in making said new survey the stakes of the said Drummond line, laid out according to the said Drummond survey, were either destroyed or removed and new stakes bearing no distinctive marks were substituted therefor along the line of the new survey, which stakes were by plaintiff understood and believed to represent the said Drummond line as affected by said minor changes. On or about February, 1923, the exact date being unknown to plaintiff, new plans representing the survey of said Corwine and Olsen of the said highway, duly signed and approved by the said engineer and superintendent, were delivered to plaintiff by the said engineer as superseding [fol. 9] the original plans. Said new plans did not advise plaintiff on their face that they represented a substantial departure from the line of the original survey and were understood and believed by plaintiff to represent only such changes as were referred to in said supplemental contract.

The said line and grades so fixed and set by the said state engineer according to the said Corwine and Olson survey, as was well known to said state engineer and his assistants, differed from the original line and the minor alterations referred to in said supplemental agreement in this:

That whereas the said Drummond line had skirted the shore line of said Wind River, the Corwine and Oslin line was moved back from said shore line to the steep places and slopes bordering said river, and in many places into solid rock, requiring much more difficult and expensive operation in excavating and building the said highway. The character of the country was such that the moving of the line literally for a distance of a few feet would in many instances entirely change the character of the work, rendering it much more difficult. So that a short change in distance entirely changed the nature of the material to be handled. Such new line not only materially and substantially changed the character of the material to be excavated but change the entire scheme of construction in many places and altered the engineering features, so that plaintiff, in constructing such highway, was required to go to far greater expense, for which no additional compensation has been given or paid. Also, in many places the

line as fixed by the engineer under the new survey required the roadway to be constructed by means of excavation and cuts the slope whereof was so steep that the material forming the slides thereof could not remain in repose, as was well known to the defendant, or could by the exercise of reasonable diligence have been ascertained by defendant; wherefor plaintiff protested at constructing the slope so established but was required by the engineer to slope the same at such improper angle, and then was required by the engineer to re-slope the same, and in many instances was required to re-slope the same a number of times until, by experiment, the so-called "angle of repose" was ascertained. In general the new line fixed by the engineer and the stakes of the engineer placed thereunder was such that the extent and position of cuts in relation to the fills was greatly increased; so that plaintiff at greater expense was required to waste the materials for fills, and then borrow materials for fills, for which no compensation has been allowed. That the said line as set and fixed by the state engineer according to the new survey was such [fol. 10] as to require an increased yardage of material to be excavated over that allowed by the cross-sections or estimates of quantities thereof, by reason of the natural sloughing of material to a grade of repose back of the slopes cross-sectioned. That by reason of the said line as fixed by the engineer and the instructions of the engineer thereunder an amount of resurfacing with hand sorted material was required which was not required under the said contract or supplement thereto.

9. That in constructing the said new line as the same was fixed by the said engineer and staked by him, plaintiff performed the following amount of construction work which was not required to be done under the said Drummond plans and lines and the said supplemental agreement, and not covered by the rate of compensation provided therein, but was at an excessive cost for the same and which defendant has entirely failed and refused to compensate plaintiff for, which work is in addition to work of the character and kind required under the original contract and supplement thereto:

On Section B. Solid rock excavation in the amount of 21,608 cu. yds. of the reasonable cost and value of $2.10

per cu. yd. due to the natural sloughing of the material outside of the cross-sections, caused by improper staking, amounting to $45,376.80. Extra cost of construction due to changing from a borrow job under the Drummond line to an excess cut job under the Corwine and Olson line, as heretofore stated, consisting of 104,135 cu. yds. of excavation, at the reasonable cost and value, in excess of the rate of $1.50 per cu. yd. allowed under the original contract, of 60c per cu. yd., amounting to $62,481.00. Hand sorted rock surfacing of highway, under written instructions of the engineer, in the amount of 23,014 cu. yds. of the reasonable cost and value of $2.50 per cu. yd., amounting to $5,785.00.

On Section C., Extra embankment, or its equivalent increased cost of excavation, due to changing from a borrow job to an excess cut job, 104,925 cu. yds. of the reasonable cost and value of 68½c per cu. yd. amounting to $96,533.62. Extra embankment due to raising of grade upon order of the engineer, 9,987 cu. yds. at the reasonable cost and value of 68½c per cu. yd., amounting to $6,841.09. Extra excavation due to raising of grade by order of engineer 9,987 cu. yds. of the reasonable cost and value of 68½c per cu. yds. amounting to $6,841.09. Extra solid rock excavation, 112,784.9 cu. yds. of the reasonable cost and value of $1.65 per cu. yd. less the amount of 68½c per cu. yd. allowed by [fol. 11] the defendant therefor, amounting to $108,837.43. Hand picked rock surfacing, done under order of engineer, 13,602 cu. yds. the reasonable cost and value of $2.50 per cu. yd. less the sum of $4760.70 allowed by defendant as backfill, of the reasonable cost and value of $29,244.30. Experimenting in slopes by reason of improper staking on engineer's order, of the cost and value of $60,000.00. Extra excavation outside of cross-section stakes caused by improper staking of slopes, 49,801 cu. yds. of the reasonable cost and value of 68½c per cu. yd. amounting to $34,113.60. That a copy of the items of such extra work and labor due to the changing of said line as heretofore stated is hereto attached as Exhibit C and made a part of this petition.

10. That on or about Nov. 10, 1924, the said state engineer made and filed with said commission his final estimate of the amount of work done by plaintiff and the compensation plaintiff was to receive therefor, in which he found:

As to Section B of said highway that plaintiff had performed 2,314 cu. yds. of roadway excavation and embankment, backfill, at 35c per cu yd., amounting to $809.00; 1,316.4 cu. yds. of overhaul at the contract price of 16c per cu. yd., amounting to $210.62; had installed 98 lineal feet of 15-inch corrugated iron culvert at the contract price of $1.65 per ft., amounting to $161.70; had installed 174 lin. feet of 18-inch corrugated iron culvert at the contract price of $2.00 per lineal foot, amounting to $348.00; had installed 104 lineal feet of 36-inch corrugated iron culvert at the contract price of $3.75 per foot, amounting to $390; had constructed 337.15 cu. yds. of dry rubble masonry at the contract price of $4.50 per cu. yd., amounting to $1,517.18; had performed 104,134.7 cu. yds. of unclassified excavation at the contract price of $1.50 per cu. yd., amounting to $156,-202.05; had performed 891.6 lin. ft. of tunnel excavation at the contract price of $70.00 per ft., amounting to $62,412; had performed 60,304 cu. yds. station overhaul at the contract price of 2c per cu. yd., amounting to $1,206.08; had constructed 39.10 cu. yds. of cement rubble and walls at the contract price of $14.00 per cu. yd., amounting to $547.40; making a total estimate for said Section B, of $223,804.93.

As to said Section C. That plaintiff had performed 13,-602 cu. yds. of roadway excavation and embankment, backfill, at the contract price of 35c per cu. yd., amounting to $4,760.70; had installed 1678 lin. ft. of 15-inch corrugated iron culvert at the contract price of $1.65 per ft. amounting [fol. 12] to $2,768.70; had installed 308 lin. ft. of 18-inch corrugated iron culvert at the contract price of $2.00 per foot, amounting to $616.00; had installed 736 ft. 24-inch corrugated iron culvert at the contract price of $2.70 per foot, amounting to $1,987.20; had installed 626 lin. ft. of 36-inch corrugated iron culvert at the contract price of $3.60 per foot amounting to $2,253.60; had constructed 944.2 cu. yds. of dry rubble masonry at the contract price of $2.00 per cu. yd., amounting to $1,888.40; had constru-ed 1.52 cu. yds. of Class B concrete end walls at the contract price of $25.00 per cu. yd. amounting to $38; had performed 383,315 cu. yds. of unclassified excavation at the contract price of 68½c per cu. yd. amounting to $262,570.78; had performed 26,137 cu. yds of station overhaul on item 1, at

the contract price of 2c per cu. yd., amounting to $522.74; had constructed 386.25 cu. yds. of cement rubble end walls at the contract price of $14.00 per cu. yd., amounting to $5,407.50; making a total amount of $282,813.62.

As to Section D. That plaintiff had performed 52 cu. yds. of excavation for structure at the contract price of $1.25 per cu. yd., amounting to $65.00; had constructed 39 cu. yds. of Class A concrete work at the contract price of $25.00 per cu. yd. amounting to $975.00; had installed 200 lin. ft. of 15-inch corrugated iron culvert. at the contract price of $1.65 per foot, amounting to $330.00; had installed 40 lin. ft. of 18-inch corrugated iron culvert at the contract price of $1.90 per [per] ft., amounting to $76; had installed 70 lin. ft. of 36-inch corrugated iron culvert at the contract price of $3.60 per ft., amounting to $252; had installed 4,399 pounds of deformed steel bars at the contract price of 7c per pound, amounting to $307.93; had constructed 19.9 cu. yds. of Class B concrete end walls at the contract price of $25.00 per cu. yd., amounting to $497.50; had performed 15,730 cu. yds. of unclassified excavation at the contract price of 18c, amounting to $2,831.40; making a total amount of $5,334.83.

11. That plaintiff performed all of said construction work for the defendant as set out and contained in said final estimates of the state engineer; that said estimate was accepted by the defendant and approved by it as its offer of payment to plaintiff for the work done in the construction of said highway. But that in addition to the amount of work and construction and the value thereof as contained in said engineer's estimate, plaintiff performed the extra work and at the excessive costs and value as set out in paragraph 9 [fol. 13] of this petition; but the said state engineer and the defendant have refused since said final estimate was made on November 10, 1924, and still refuse, although demanded so to do, to pay any additional sums than that contained in said engineer's final estimate.

12. That by reason of the facts hereinbefore set out plaintiff has been damaged in the sum of $456,053.93, with interest at the rate of 7% per annum from November 10, 1924, until paid.

And for a second cause of action and for a second and further breach of said contract, plaintiff alleges:

1. That plaintiff incorporates by reference the allegations of paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 (incl.) of the first cause of action, and makes said paragraphs a part of the said second cause of action.

2. That plaintiff performed each and every covenant and condition on its part to be performed under the said contract; but that of the amount of $511,953.38 so found to be due by the said engineer and the defendant, the defendant had paid only the sum of $423,179.57, leaving a balance due and unpaid to plaintiff of $88,773.81. Defendant, although demanded so to do, has refused and failed to pay the said $88,773.81, since November 10, 1924, when it became due, unless plaintiff would execute and deliver to defendant a written release and waiver of all damages and claims for extra compensation as set out in the first cause of action herein, which plaintiff has refused and refuses to do.

Wherefore, plaintiff demands judgment under its first cause of action for the sum of $456,053.93 with interest thereon at the rate of 7% per annum from November 10, 1924, until date of judgment; and under its second cause of action for the sum of $88,773.81, with interest thereon at the rate of 7% per annum from November 10, 1924, until date of judgment, and for plaintiff's costs.

Marshall, Macmillan & Crow, Continental Bank Building, Salt Lake City, Utah, W. L. Walls, Hynds Building, Cheyenne, Wyoming, Attorneys for Plaintiff.

[fol. 14] *Duly sworn to by William L. Walls. Jurat omitted in printing.*

EXHIBIT A TO AMENDED PETITION

Fed. No. —. State No. —.

State of Wyoming, Highway Department

Specifications, Proposal, and Contract of (Contractor:) —— ——, (Home Address:) —— ——, on (Road or Structure:) ——,——, —— County, Wyo.

Length: — Miles

Definition of Terms

In interpreting these specifications, the following definitions shall prevail:

1. Commission.—The term "Commission," as herein employed, shall be held to mean the State Highway Commission of Wyoming, or its duly authorized representative.

2. Engineer.—The State Highway Engineer of Wyoming, acting directly or through his duly authorized assistants, such assistants acting within the scope of the particular duties entrusted to them.

[fol. 15] 3. Inspector.—An authorized assistant of the Engineer, assigned to inspect any feature of the materials or workmanship entering into the improvement.

4. Contractor.—The person, partnership, or corporation, constituting one of the principals to the contract, of which these specifications form a part, and undertaking to perform the work herein specified, or any lawful agent of such person, partnership or corporation.

5. Plans.—The official plans, profiles, cross sections, and other drawings and details of the work to be done, and which are to be considered in the contract as coordinate with these specifications.

6. Contract.—The agreement between the contractor and the State Highway Commission covering the work to be performed and including the plans and specifications.

7. Specifications.—The directions, provisions and requirements contained herein, together with all written agree-

ments made or to be made, pertaining to the method and manner of performing the work or to the quantities and qualities of materials to be furnished under the contract.

Instructions to Bidders

Interpretation of Approximate Estimate.—Bidders are cautioned that the estimate of quantities attached hereto will serve, so far as this contract is concerned, only for the purpose of comparing bids. The basis of payment will be actual quantities of work performed, and if, upon the completion of the project, the actual quantities should show either increase or decrease from the quantities shown in the approximate estimate the unit prices mentioned in the proposal will still prevail.

Examinations of Plans, Specifications, and Site.—Bidders are required to examine the site of the proposed work, as well as the plans and specifications, for the improvement, and professions of ignorance regarding the requirements of the work will in no way serve to modify the provisions of the contract.

Laws Affecting Public Work.—The attention of bidders is called to the necessity of being familiar with the various Federal, State and local laws, affecting the length of working days, employers' liabilities, Sunday work, etc.

[fol. 16] Proposal Forms.—In filling out proposal forms bidders shall be governed by the following provisions: (1) Proposals must be made on the blank form provided herewith. The blank spaces in the proposal form, except as otherwise noted, must be filled in, and no change shall be made either in the phraseology of, or in the items mentioned in, the proposal form.

(2) Proposals must be signed in ink by the bidder with the signature in full. When a firm is a bidder, the agent who signs the firm name to the proposal shall state, in addition, the names and addresses of the individuals composing the firm. When a corporation is a bidder, the person signing shall state under the laws of what state the corporation was chartered and the name and title of the officer having authority under the by-laws to sign contracts. The pro-

posal shall also bear the seal of the corporation, attested by its secretary. Any one signing the proposal as agent must file with it legal evidence of his authority to do so. Post office address, county and state must be given after the signature.

(3) Proposals that contain any omission, erasure, alteration, addition, or item not called for in the engineer's estimate, or that show irregularities of any kind, will be rejected as informal.

(4) Each proposal shall specify a unit price, written with ink in both words and figures, for each of the separate items as called for, and shall also show the products of the respective unit prices and quantities of work, written in figures with ink, in the column provided for that purpose. The gross bid, or sum of the various products, shall be shown, written in ink on the line provided for such gross bid.

(5) Any proposal which does not contain prices set opposite each of the several items for which there is an estimated quantity in the engineer's estimate, or any proposal which shall in any manner fail to conform to the conditions of the published notice inviting proposals, may be deemed informal and rejected.

(6) Each proposal must be accompanied by a money deposit equal to two (2) per centum of the amount of the proposal, in the form of cash, a draft, or a certified check, issued by a bank, in good credit and payable at sight to the State Highway Commission of Wyoming.

(7) Proposals will be placed in a sealed envelope so marked as to indicate its contents without being opened. [fol. 17] This envelope shall then be placed in another addressed as indicated in the notice to contractors. Proposals may be delivered either in person or by mail.

(8) If a bidder wishes to withdraw his proposal, he may do so, without prejudice to himself, provided that a written request is filed at the address indicated above not later than the day before the bids are to be opened.

(9) Proposals will be publicly opened at the time and place mentioned in the notice to contractors, and bidders

are invited to be present at the opening. Proposals received after the date set for the opening will be returned to the bidder unopened.

Disqualification of Bidders—The following causes will be considered sufficient to disqualify any bidder and no proposals from disqualified bidders will be considered.

(1) Interest by the same persons in more than one proposal.

(2) Collusion among or between bidders.

(3) Unbalanced proposals; that is, proposals in which the prices bid for some items are out of all proportion to those bid for others.

(4) Lack of responsibility on the part of bidders.

(5) Lack of experience or capital on the part of bidders. Evidence of experience, ability, and financial standing, as well as a statement regarding plant and machinery available may be required of any or all bidders.

Award and Execution of Contract

Right to Reject Bids—After the proposals are opened and read, the bid prices will be compared by the State Highway Engineer, and the results of such comparisons will be immediately made public.

Award of Contract—The award of the contract, if it is awarded, will be to the lowest responsible bidder whose proposal shall comply with all requirements necessary to render it formal. For the purpose of award the summation of the products of the approximate quantities, herein stated, by the unit prices will be considered the amount of the bid. In no case will an award be made until all necessary investigations are made into the responsibility of the low bidders.

[fol. 18] Return of Proposal Guaranty.—As soon as the bid prices have been compared, the engineer may, at his discretion, return the guaranty deposits accompanying such proposals, as in his judgment would not likely be considered in making the award. All other proposals guaranties will

be held until the contract and bond have been executed, after which they will be returned to the respective bidders whose proposals they accompany.

Contract Bond Required.—The bidder on grading and surfacing work to whom the contract is awarded will be required to furnish bond equal to fifty per cent of the total amount of the contract price. The bidder on concrete and steel structures to whom the contract is awarded will be required to furnish bond equal to 100 per cent of the total amount of the contract price. The bond shall be furnished by a reputable bonding company, and shall be satisfactory to the State Highway Commission and on the form provided herewith.

Execution of the Contract.—The contract shall be signed by the contractor and satisfactory bond furnished within ten days after he has received notice of award. The place at which the contract must be signed and attested shall be specified in the notice of award. In case of failure on the part of the contractor, to enter into contract and furnish bond as above required, the guaranty accompanying his proposal will become forfeited and become a donation to the State Highway Fund. Award may then be made to the next lowest bidder, or the work be re-advertised, as the State Highway Commission may decide.

Sub-letting or Assigning Contracts—All awards will be made with the understanding that the work awarded will be performed by the contractor to whom the award is made, with the assistance of workmen under his immediate superintendence, and the contract shall not be sub-let to another contractor except with the written consent of the State Highway Engineer.

The Use of Patented Processes, etc.—The basis on which a contract will be awarded will be the bid prices, and these shall include all charges for the use of patented processes, materials or methods, and for all other similar incidental charges not expressly provided for in the specifications.

General Provisions

Scope of Work to be Done—The contractor will be required under these specifications to perform the following work:

[fol. 19] 1. To grade the subgrade and shoulders, construct the base course and surface and bring the same to the lines, grades and tupical cross section shown on the approved plans and to do the work in accordance with the plans and specifications.

2. To do all clearing and grubbing, ditching, grading, shaping and surfacing; to make all excavations and embankments; to construct all paving masonry, and stone work, to build all waterways, drains, ditches, and culverts; and to clear away all rubbish which may obstruct the roadway, ditches or waterways, whether such obstructions result from his operations or otherwise. In short, the contractor will be required to furnish all materials, implements and labor necessary to build and put in perfect condition for use, the entire roadway with all appertaining structures, and shall leave the roadway and adjoining property in neat condition and free from rubbish or other waste materials.

3. To start the im-rovement at the part of the road designated by the Engineer, and to conduct and complete the work in accordance with the plans and specifications as interpreted by the Engineer. The unit prices mentioned in the proposal shall cover the cost of all materials and labor.

Permits and Licenses.—Such permits, licenses, insurance policies, etc., as may be necessary in order to comply with state or local laws in conducting the work, shall be provided by the contractor at his own expense.

Interpretation of Plans and Specifications.—The contractor shall not deviate from the plans and specifications in any particular without the written authority of the engineer. In case of discrepancies between the plans and specifications, the plans are to take precedence, and in case of discrepancies between figured dimensions and scale, on the plans, the figures are to govern. In case special provisions or work, not covered in the plans or standard specifications are to be required, the clauses covering the requirements for such special provisions or work and attached to the proposal form, shall take precedence over any other requirements contained in the plans or standard specifications with which such clauses may conflict.

Alterations.—The State Highway Engineer shall possess the right to make reasonable changes in the plans or character of the work, when in his judgment these may be desirable, but such changes shall not serve to increase the cost of the work to the contractor unless he receives suit-[fol. 20] able compensation therefor. All orders regarding changes in the plans or specifications must be in writing and signed by the State Highway Engineer. After the work is performed no claims for extra allowances, on account of alterations in the plans or specifications will be considered unlses supported by a written supplementary order as provided above.

Additional Work.—The State Highway Engineer shall possess the right to increase the amount of work to be done, within the limits of the plans, without other formality than a written order. Such added work will be paid for at the contract unit prices, where these apply or in the absence of contract unit prices, covering the kind of work ordered, payment will be made on the following Force Account basis. (1) The contractor shall furnish all materials required on account of the extra work, at their actual cost to him. (2) He shall furnish all necessary labor at actual cost plus 10 per cent to cover the cost of supervision and the rental of small tools and ordinary equipment. (3) In case special equipment or machinery is required in order to perform the extra work economically, the State Highway Engineer may order the use of such equipment and machinery, and payment for same will be made on rental basis at the rate agreed upon in writing between the engineer and contractor.

Unauthorized Work.—No payment will be made for work not required on the plans or authorized in writing by the State Highway Engineer.

Progress of the Work.—The contractor shall begin work promptly after the contract has been executed and shall so prosecute the work that the progress made will be approximately proportional to the amount of time elapsed after the date of the contract. Failure to comply with this requirement may result in the annulment of the contract as hereinafter provided.

Limitation of Operations.—The contractor shall so limit his operations as not to have any unduly large section of the road under construction at the same time, and shall keep all of his activities segregated within as small compass as practicable.

Character of Workmen and Equipment.—All equipment and workmen provided by the contractor shall be the best available for the kind of work performed. Any person employed by the contractor, whom the engineer may deem incompetent or unfit *for* perform the work, shall upon the written instructions of the engineer, be discharged, and [fol. 21] such person shall not be again employed on the work. Failure by the contractor to provide adequate equipment may result in annulment of the contract as hereinafter provided.

Co-operation of Contractor Required.—The contractor shall keep copies of the plans and specification on the work at all times. He shall also remain on the work or provide anauthorized representative to receive and carry out instruction of the engineer. He shall provide all reasonable facilities to enable the engineer or inspectors to inspect the workmanship and materials entering into the work, and shall cooperate in the matter of setting and preserving stakes, bench marks, etc., for controlling the work.

Laws to be Observed.—In prosecuting the work, the contractor shall exercise care to see that all laws are observed, both by himself and his employes. He shall also observe the rules of the Boards of Health and shall take reasonable steps to insure proper sanitation in connection with all of his activities.

Public Convenience and Safety.—In conducting the work the contractor shall interfere as little as possible with public traffic over the road. He shall establish barricades, danger warnings and detour signs wherever these would add the safety or convenience of the public. He shall exercise especial precautions in the storage and use of explosives to warn away the public as well as to safeguard his employes.

Preservation of Property.—The contractor shall preserve from damage all property along the lines of the work, the removal or destruction of which is not called for by the

plans. This applies to public utilities, trees, monuments, fences, etc. and wherever such property is accidentally damaged due to the activities of the contractor, it shall be immediately restored to its original condition.

Responsibility in Case of Damage to Persons or Property.—The responsibility for all damage to persons or property arising out or on account of work done under this contract, shall rest upon the contractor, and he shall save the State of Wyoming harmless from all claims made on account of such damage.

Responsibility for Damage to Work.—Any damage to the work before it is finally accepted, whether such damage is due to ordinary or extraordinary causes shall be repaired by the contractor; except that where a section or portion of road is opened to public traffic, with the approval of the [fol. 22] engineer, before final acceptance, the contractor will not be expected — make good the ordinary wear due to traffic, provided that no inherent defects in the work are disclosed. But this exception will not serve to release the contractor from responsibility for damage caused by storms, or otherwise, except as noted, to sections of road that have been opened to traffic.

While the improvement is under way the engineer may, in case of urgent necessity, and under a supplementary agreement with the contractor, issue permits for ditches or other openings to be made across or along the road by others than the contractor. In case of damage to the road on account of work done under such permits, the contractor shall correct the damage and collect payment therefor on a force account basis, from the party or parties to whom the permits were issued. Failure on the part of the contractor to correct damage of this kind, and collect payment as prescribed, before the parties responsible for the damage have completed their operations, may result in making the contractor liable for the necessary repairs at his own expense.

Testing Materials.—The engineer may require samples of any or all materials used in the work to be tested in the laboratories of the U. S. Office of Public Roads and Rural Engineering or in the laboratories of the University of Wyoming or other laboratories designated as satisfactory

by the State Highway Engineer. The contractor shall afford such facilities as the engineer may require for collecting and for warding these samples, and shall hold the materials represented by the samples until tests have been made and the materials found equal to the requirements of the specifications or to approved samples. However, no more time will be required for making the tests than is customary for laboratory tests of the kind involved, with a reasonable allowance for transportation of samples, unavoidable delay in beginning the tests, and the return by mail of the laboratory reports. The contractor in all cases shall furnish the required samples without charge.

Materials may be rejected by the engineer, whenever, in his judgment, they fail to meet the requirements of the specifications, and when rejected they shall be immediately removed from the work and disposed of as hereinafter specified.

Storage of Materials.—All materials intended for use in the work shall be so stored as to prevent damage from exposure to the elements, admixture of foreign materials or from any other cause. The engineer will refue to accept, [fol. 23] or sample for testing, any materials that are improperly stored.

Use of Materials Found on Work.—In the absence of special provisions to the contrary, any stone, gravel, sand, etc. that may occur in excavations opened in grading the road, any timber that would necessarily be removed in making the improvement, or any existing structures that are to be replaced, may be used by the contractor, provided, and to the extent, that these materials are suitable for and required in the work. Materials so used and paid for in some other form than excavation or clearing, as the case may be, will not be paid for as excavation or clearing. Materials found on the work, especially timber and existing structures, and necessarily removed, but not used by the contractor as provided above, shall be put into shape to be handled ecoonmically and neatly piled along the right-of-way as the engineer may direct.

Lines, Grades, and Measurements.—The engineer will furnish all lines, grades and measurements necessary in

laying out the work or in determining the quantities of work performed. Such stakes and markings as the engineer may set for either his own or the contractor's guidance shall be scruplously preserved by the contractor. In case of negligence on the part of the contractor or his employees resulting the destruction of such stakes or markings, an amount equal to the cost of replacing same will be deducted from subsequent estimates due the contractor.

Crown or Cross-section of Roadway.—The typical cross section contained in the plans shall be implicity followed as regards the crown or cross section of the roadway, except that where considerations of drainage or other special conditions make it necessary or desirable to change the shape of the surface, or to otherwise alter the shape of the cross section, the engineer may fix this feature of the work to fit the conditions.

Authority and Duties of Inspectors.—The engineer may appoint inspectors to inspect all materials used and all work done. Such inspection may extend to all or any part of the work and to the preparation or manufacture of the materials to be used. The inspectors will not be authorized to revoke, alter, enlarge, or relax the provisions of these specifications, nor to delay the fulfillment of the contract by failure to inspect materials and work with reasonable promptness. An inspector is placed on the work to keep the engineer informed as to the progress of the work and the manner in which it is being done; also to call the at-[fol. 24] tention of the contractor to any infringements upon plans or specifications. He will not be authorized to approve or accept any portion of the work or issue instructions contrary to the plans and specifications. The inspector will have authority to reject defective material and to suspend any work that is being improperly done, subject to the final decision of the engineer.

The inspector will exercise such additional authority only as may from time to time be delegated to him by the engineer.

Inspection of Materials and Work.—The engineer and his inspectors shall have free access to all parts of the work and to all materials intended for use in the work as well as to the factories where such materials are manufac-

tured. Materials will be inspected and passed upon as promptly as practicable after they are delivered on the work, and none shall be used in the work until after approval. The work will be inspected as it progresses, but failure to reject or condemn defective work at the time it is done will in no way prevent its rejection whenever it is discovered before the road is finally accepted and approved.

Defective materials or work shall be removed and disposed of immediately after they are rejected. The disposition to be made of defective materials shall in all cases be such that the engineer can always satisfy himself that each lot or parcel of such material has been disposed of as claimed by the contractor.

Upon the failure of the contractor to remove and properly dispose of rejected material or work immediately after receiving formal notice, the engineer may employ labor and remove such material or work, and charge the cost of same to the contractor.

Final Cleaning Up.—When the work is completed the right-of-way borrow pits and all ground occupied by the contractor in connection with the work shall be cleared of all rubbish, excess materials, temporary structures and equipment, and all parts of the work as shall be left in a neat and presentable condition.

Suspension of Work.—The engineer shall have authority to suspend the work on account of (1) default of the contractor; (2) unfavorable weather conditions, and (3) any other condition which, in the judgment of the engineer, makes it impracticable to secure first-class results. The [fol. 25] contractor shall immediately respect the written order of the engineer to suspend operations wholly or on any particular section of the road.

Time of Completion.—In computing the time allowance for completing the work the engineer will allow an additional number of working days, over and above the time allowance mentioned in the proposal, equal to the number of working days lost by the contractor after starting the work, because of conditions which the engineer considers such as to prevent proper work and during which days work was actually suspended or materially impeded. The basis

for computing any extra time allowance will be the condition record kept by the engineer or his assistants.

Should the contractor fail to complete the work within the time allowance mentioned in the proposal, subject to the above modification, the engineer will thereafter deduct from any moneys due or coming due to the contractor, as determined by the engineer's estimates, an amount equal to the cost of maintaining the necessary force of engineers and inspectors on the work during the additional time, and this amount shall be considered as reasonable liquidated damages due the State of Wyoming by the contractor for his failure to have finished the work in the specified time limits.

Failure to Perform Contract.—The State Highway Commission, whenever any of the following conditions exist, may enter upon the performance of the terms of the contract, of which these specifications form a part, i. e.—

If the contractor fails to begin the work under contract within the time specified, or fails to perform the work with sufficient workmen and equipment or with sufficient material to insure the prompt completion of said work, or shall perform the work unsuitably or shall neglect or refuse to remove materials or perform any such work as shall be rejected as defective and unsuitable, or shall discontinue the prosecution of the work; or if the contractor shall become insolvent or declared bankrupt, or commit any act of bankruptcy or insolvency, or allow any final judgment to stand against him unsatisfied for a period of forty-eight (48) hours, or shall make an assignment for the benefit of creditors, or from any other cause whatsoever shall not carry on the work in an acceptable manner.

Before such entry is made, the contractor and his surety will be first notified in writing by the State Highway Engineer of the conditions which make such entry imminent. [fol. 26] Ten(10) days after such notice is given, if no effective effort has been made by the contractor or his surety to correct the condition complained of, the Commission may enter for the purpose of performing the terms of said contract.

Upon receipt of a notice from the Commission that the contract has not been fulfilled and that the State of Wyoming will enter for the purpose of doing the work

necessary to complete the said contract, the contractor and all those acting under him, shall immediately discontinue all operations. The Commission, without violating the contract, may then proceed with the work in any lawful manner that it may elect until the work is finally completed, and the terms and conditions of the contract are completely performed, and may appropriate or use any or all materials and equipment on the ground as may be suitable and acceptable. The total cost of the work under contract will then be computed. If this total cost is less than the contract price, the contractor shall be entitled to receive the difference; if the total cost is greater than the contract price, the excess shall be made up and paid to the State Highway Commission by either the contractor or his sureties.

Upon the State Highway Commission entering upon the completion of said contract, it may, if it so elect, pay for such material and labor which has entered into such construction prior to the taking over of the same by the State Highway Commission hereunder, which has not been paid for by the contractor or anyone in his behalf; such costs or charges shall be deducted from any moneys due or which may become due said contractor.

Measurement of Quantities.—The determination of the quantities of work performed will be by the engineer and based on measurements taken by him or his assistants. In computing volumes the method of average and areas will be used for excavation and embankments, and the prismoidal formula for masonry. Other quantities will be computed in the units used in the proposal form, according to well recognized engineering prinicples, and no local rules or customs will be considered.

Payments.—Payment for each kind of work will be made on the basis specified for that particular item, and at the rate mentioned in the proposal. The amount computed on this basis and rate shall be payment in full for the work done including all claims of every character. No payments, however, shall constitute an acceptance of the work. [fol. 27] Partial payments will be made monthly, provided that the work is progressing to the satisfaction of the engineer. The total amount of such payments at any time

before completion shall not exceed 85 per centum of the value of the work done, as estimated by the engineer.

Whenever the total amount of work provided for by the contract shall have been completely performed on the part of the contractor, and all parts of the work have been approved by the engineer, a final estimate showing the value of the work will be prepared by the engineer as soon as the necessary measurements can be made. The amount of this estimate, less any sums that may have been deducted in accordance with the provisions of the contract, will be paid to the contractor within ninety (90) days after notice of completion is furnished by the contractor.

No Waivee of Legal Rights.—The State of Wyoming reserves the right, should an error be discovered in the estimate, or conclusive proofs of dishonesty, on the part of the contractor, discovered in the work, after the final payment has been made, to claim and recover by process of law, such sums as may be sufficient to correct the error or make good the defects in the work resulting from the contractor's dishonesty.

Maintenance.—Until the time of final approval of the work by the engineer, the contractor shall keep the finished roadway, shoulders, side slopes, ditches and drains in repair and free from obstructions and shall make good any defects in the work which may result from settlement, or otherwise. An exception to this requirement is in the case of sections or portions of roadway opened to traffic before final approval. The extent of this exception has already been defined in these specifications.

Construction Details

Excavation and Embankment.—Under this heading shall be included all clearing and grubbing, excavating, filling, borrowing, trimming, picking down, shaping, sloping, and all other work that may be necessary in preparing and grading the roadbed called for in the plans, as well as the excavation for all necessary drainage and outlet ditches, and the foundation pits for structures, and the grading of proper connections with all intersecting highways.

Clearing and Grubbing.—That portion of the right-of-way lying inside the limits of the roadbed and slopes, and such other portions of the right-of-way as the engineer may [fol. 28] require, shall be cleared and grubbed to conform with the following requirements:

The right-of-way must be cleared to the width of twenty (20) feet on each side of the center line and such additional width as may be designated by the engineer; and from the entire space required for the roadbed and necessary slopes, side drains and borrow pits there shall be cut off or grubbed up all trees, brush, stumps and other vegetable matter, which together with logs, brushwood, etc., of every description, shall be burned or removed from the grounds, as the engineer may direct, and in such a manner as not to injure the adjoining lands or obstruct the line of fences along the said right-of-way. When the embankment exceeds two feet in height it will only be required to cut the trees, stumps, and brush close to the ground; but when less than two feet in height the trees, stumps, brush and other vegetable matter found within the slope stakes must be grubbed up and removed beyond the limits of the embankment.

Removal of Structures.—Where the contractor is required to remove from the right-of-way buildings, fences, telephone poles, or other structures not constituting a part of the roadway, and the removal of which is not elsewhere in these specifications provided for, such work will be considered as extra or force account work, and shall be done according to the engineer's instructions, and paid for as provided under the clause covering additional work.

In case that structures constituting a part of the roadway, such as existing culverts or bridges, are required to be torn out and removed, such work will be considered as incidental to the structure which replaced the one removed, and will not be paid for except as excavation for structures.

Roadway Excavation.—The materials to be excavated from the roadway will be indicated on the plans, and by means of the engineer's stakes. In excavating such materials, the contractor shall observe the following precautions:

1. The work shall be so conducted that the bottom on the excavation will at all times be well drained.

2. The material excavated shall be unclassified.

3. In case solid rock is being excavated, the depth of the excavation shall be increased six (6) inches over and above the depth shown on the profile or indicated by the engineer's stakes and shall be backfilled with stone, gravel, or other material as shall pass a 1½ inch ring as directed.

[fol. 29] 4. All slopes, except in solid rock, shall be trimmed accurately to the slopes shown on the cross section drawings, and care shall be exercised that no material shall be loosed below the required slopes.

5. Roadway excavation shall include the removal of any muck, quick-sand, soft clay, or spongy material that, in the engineer's judgment, would not compact readily and form an unyielding roadbed. The contractor shall remove and replace materials of these kinds wherever the engineer may direct, without regard to the fact that such work may not be called for on the plans. Excavation of this kind will in all cases be classed as common excavation and paid for as such.

Excavations for Structures.—Foundation pits for culverts, bridges, and other structures shall be excavated to the depths and lines indicated on the plans or established by the engineer. The material obtained from such excavation shall be used, as the engineer may require, either in constructing embankments or for backfilling over and around the structures after they are complete, or in case it is unsuitable for either of these purposes, it shall be disposed or in such manner as not to obstruct the stream or otherwise impair the efficiency or appearance of the structure or other parts of the road.

The backfilling or openings made for structures shall be considered as a necessary part of the excavation though the engineer may require that the material for use in making the backfill be obtained from a source entirely apart from the structure. In all cases the backfill shall be made in layers not more than 6 inches thick, and each layer shall be thoroughly tampered or rammed before the next succeeding layer is spread. In cases where the material used in making the backfill is difficult to compact so as to prevent

subsequent settlement, the engineer may require each layer to be thoroughly flushed with water, if in his judgment such flushing would be desirable.

Embankments.—The materials excavated from the roadway in accordance with the foregoing requirements, or from borrow pits, as provided below, when of a quality satisfactory to the engineer, shall be used in constructing the embankments called for on the plans. In constructing embankments, the contractor shall observe the following rules:

1. Embankments shall contain no muck, quicksand, vegetable matter, or other material which would not compact to form a stable and enduring roadbed.

[fol. 30] 2. Where the depth of an embankment is to be less than 2½ feet, the area to be covered shall be plowed and all sod and vegetable matter removed before the embankment is started.

3. Embankments shall be formed in horizontal layers not more than one (1) foot thick, and shall be compacted by distributing the necessary hauling uniformly over each succeeding layer. Each layer shall be carried across full width and length, and where rock is being used it shall be carefully distributed so that the interstices between the larger particles are filled with earth or finer particles to form a dense compact mass. The top six (6) inches of any embankment shall not contain any stones larger than would pass through a three (3) inch ring.

4. In constructing embankments due allowance shall be made for shrinkage and settlement. That is the embankment shall be made slightly wider and deeper than called for on the plans, in order that after shrinkage and settlement are complete, the embankment may have the required cross section at all points. The engineer will co-operate in determining the necessary amounts of such allowance, but all embankments shall have the proper height, width and shape when finally accepted by the engineer.

5. Where the use of a roller is to be required in constructing embankments, the kind and weight of the roller

and the extent to which it is to be used will be specified in the special clauses accompanying the proposal form.

Disposal of Surplus Materials.—All surplus excavation and waste material shall be used uniformly to widen embankments, or flatten side slopes, or deposited in such other places and for such purposes as the engineer may direct.

Borrow Excavation.—If, after the roadway excavation intended for certain corresponding embankments is complete, additional material is required in order to complete the embankments, the contractor shall obtain the necessary additional material, either by uniformly widening the roadway excavation, within or without the free haul limits, or by excavating from borrow pits, as decided by the engineer.

Borrow pits shall not be opened by the contractor until their location has been approved and cross sectioned by the engineer. The excavation shall be made, in accordance with some reasonable design, so that when the operations of the contractor are complete, the pit will present a neat [fol. 31] appearance, drain itself where practiable, and be of a shape easily cross sectioned.

Special Borrows.—In unsettled districts when approved by the engineer and by the property owners affected, the contractor may borrow suitable material at any place or in any manner most convenient for him, provided these borrows are outside of the road lines and do not affect the drainage of the road. Where such borrows cannot be easily cross sectioned the basis of settlement will be figured on the amount of embankment furnished as indicated under the heading "Excavation Quantities". Work of this nature is classified as "Special Borrows".

Overhaul of Excavation.—When the distance between the center of gravity of any cut and the center of gravity of the corresponding embankment exceeds a distance of five hundred (500) feet, all of the material obtained from the cut and used in the embankment shall be known as overhaul excavation, and the length of overhaul shall be measured as the distance between center of gravity of cut and center of gravity of fill minus the specified free haul distance of 500 feet.

Subgrade.—Where the road is to be surfaced, the subgrade shall consist of good, sound earth brought to the proper elevation, alignment, and cross section, and when ordered by the engineer shall be rolled until firm and hard. The rolling shall be done with a self-propelled roller of macadam type approved by the engineer, weighing not less than 10 tons and not more than 15 tons. When the rolling is completed the surface of the sub-grade shall conform to the cross section elevation and alignment shown on the plans and shall be so maintained until the surfacing material is in place.

Shoulders.—Where the road is to be surfaced with some material other than earth, shoulders shall be constructed as a part of the excavation and embankment. The manner in which the shoulders shall be built up, shaped, and compacted is described in the specifications covering the base course and surfacing.

Excavation Quantities.—The quantities of material moved shall be measured in excavation, and computed by means of the method of average and areas. In taking the measurements the engineer will include unavoidable overbreaks in solid rock excavation, not to exceed, in any half station of 50 feet, ten (10) per cent of the theoretical quantity of excavation required for the same half station. Unavoidable slides occurring after the section has been completed or slides of [fol. 32] loose rock which must be removed before the section can be finished according to the original cross section will also be measured and included in the estimate. Other material excavated outside of the lines shown on the plans, or established by the engineer in case of borrow pits, will be disregarded in preparing the estimates and will be at the contractor's expense. The amount of excavation from "Special Borrows" will be determined by computing the amount of finished compacted embankment furnished from such borrow measured in embankment with no allowance for shrinkage. The amount of excavation for machine grading will not be figured as this item is paid for by the mile except for special materials as indicated under the heading "Machine Grading."

Finishing Earth Roads.—After all excavation and embankment, and all structures are complete, the entire surface of the road shall receive a finish shaping with a grading machine. When the finish shaping is complete the road surface shall conform accurately to the typical cross section shown on the plans, and no roots, sod, or other deleterious matter, nor stones that would fail to pass a 3-inch ring shall be within 6 inches of the finished surface.

Basis of Payment.—The ontractor will be paid for the work included under the general heading "Excavation and Embankment" according to the following plan:

1. Roadway excavation will be paid for at the unit prices bid unclassified Exc. and emb. items 41, 42 and 43. Payment, based on these unit prices, shall be full recompense for all work specified under the sub-headings "Clearing and Grubbing," "Roadway Excavation," "Embankments," "Disposal of Surplus Materials," "Borrow Excavation," "Shoulders," "Sub-grade" and "Finishing Earth Roads."

2. Excavation for structures will be paid for at the price bid for excavation of this kind. Payment based on this price shall be full recompense for all work done in excavating and back-filling the material and for all other incidental work specified under the sub-heading "Excavation for Structures."

3. Overhaul of excavation will be paid for at the rate bid for overhaul per cubic yard per station of 100 feet. The amount of overhaul will be estimated in the manner specified under the subheading "Overhaul of Excavation."

4. Back fill in rock cuts as provided under roadway excavation shall be paid for at the unit price bid for emb. item [fol. 33] No. 1. Any overhaul will be paid for at price bid for overhaul item No. 45.

Subbase.

Description.—This "Subbase" shall consist of approved stone placed in excavations made by the removal of soft, unstable or other unsuitable subgrade materials, and shall be constructed, where directed, in accordance with these specifications.

Material.—The material to be used shall consist of sound, tough, durable telford stone, napped field or quarry stone, crushed rock or slag, or gravel. The "Telford" stone shall be approximately rectangular in section, from two (2) to six (6) inches in width, six (6) to twelve (12) inches in length and eight (8) inches in depth; the field or quarry stones shall not be more than five (5) inches in their largest dimension after napping; and the crushed rock, slag or gravel shall consist of pieces varying from one to one-quarter (1¼) to three and one-half (3½) inches in diameter. All stone shall be approved before being used.

Construction Methods.—Unsuitable subgrade materials shall be removed, and the bottom of the excavation shaped uniformly and compacted firmly, and the stone placed in the excavation. If "Telford" stones are used, they shall be laid at right angles to the center line of the roadway and rammed in layers of not more than eight (8) inches in depth; or if napped field or quarry stone, crushed rock, slag or gravel is used, it shall be spread and rammed in layers of not more than five inches. When delivered this material shall be dumped along the sides of the roadway and not directly into the excavation, but shall be placed carefully therein by hand or with shovels. After the material has been placed and rammed in layers until slightly above the surrounding subgrade surface, it shall be rolled and the voids filled with small stones, the rolling and filling being continued until the entire mass is compacted thoroughly and satisfactorily. The finished surface shall conform to the grade and cross-section of the surrounding sub-grade.

Basis of Payment.—This work will be paid for at the contract unit price per cubic yard for "Subbase" complete in place, which price will include all excavation, materials, equipment, tools, labor, and work incidental thereto, also the disposal of the excavated materials.

[fol. 34] Drainage Structures

All concrete and masonry culverts, and walls for pipe culverts, retaining walls, catch basins, drop inlets, etc., shall be built of Class "B" concrete and according to the plans and specifications therefor.

Pipe Culverts and Siphons.—Pipe culverts and siphons shall be constructed of the length specified and wherever indicated on the plans or directed by the engineer, in writing. Typical plans for the guidance of the contractor will be furnished for each particular kind of pipe culvert and siphon required.

Corrugated Metal.—Corrugated metal pipe for culverts shall pre pro-erly fabricated from corrugated galvanized sheets of steel or iron, free from blisters, seams, slag or other foreign material. Each culvert shall be made from the same quality of metal and the sheets of metal before galvanizing shall be not less than 16 gauge, U. S. Standard, for pipe having a diameter of 20 inches or less, and not less than 14 gauge, U. S. Standard, for pipe between 20 and 42 inches in diameter. The corrugations shall be not less than 2½ inches, or more than 2¾ inches from crest to crest and shall have the depth of not less than one-half, or more than five-eighths inch.

The galvanizing shall consist of not less than two ounces of prime smelter per square foot uniformly distributed over the surfaces of the sheets of metal and free from imperfections of any kind. It shall be applied in such manner that the spelter will not peel off during fabrication or in transporting and laying the pipe. The amount of spelter per square foot will be determined by the lead acetate method upon a sample taken from the culvert. Pipe having bare or uncoated spots will be rejected.

All joints shall be even and close and the jointed pipe shall be straight, circular in section, true and rigid.

In the longtitudinal joints, rivets shall be driven in the valley of each corrugation and in the transverse joints, rivets shall be uniformly spaced not more than six inches apart. The rivets shall be driven in such a manner as to draw the sheets tightly together, and to completely fill the rivet holes. The rivets shall have neat, workmanlike, semispherical or flat heads, and shall be at least one inch from the edge of the sheets.

[fol. 35] All rivets shall be of the same quality of metal as the sheets in which they are used. They shall be thoroughly galvanized and shall be not less than five-sixteenths of an inch in diameter. The heads of the rivets shall have

a diameter of not less than one and five-tenths times the diameter of the rivet plus one-eighth of an inch, and all flat heads shall have a thickness of not less than six-tenths that of the diameter of the rivet.

All pipe shall be furnished in the lengths ordered, except that pipe for culverts more than 30 feet in length may be furnished in sections not less than 15 feet in length, provided the manufacturer furnishes field connections, free of any charge. The connections shall consist of bands not less than eight inches in width, made from the same material as the pipe, properly fitted with malleable cast iron lugs, provided with galvanized bolts, not less than three-eighths of an inch in diameter. The connection shall be so fabricated that a secure and firm connection of the sections of pipe may be readily made in the field.

The diameter of the metal pipe shall be understood to mean the clear diameter. For example, a pipe 18 inches in diameter shall be of such size that a sphere 18 inches in diameter may be rolled through it except for interference by rivet heads.

All pipe shall be so loaded for shipment that it will arrive at its destination with all galvanizing intact and free from bruises.

Construction Methods.—All pipe shall be laid true to the lines and grades furnished by the engineer, and the bottom of the trench shall be so rounded and prepared that the pipe will be uniformly supported throughout its length. Wherever solid rock occurs in a culvert trench it shall be excavated to a depth of at least 6 inches below the pipe and the space thus made refilled with selected fine material. In like manner, earthy material that is not sufficiently firm to support the pipe uniformly shall be excavated and replaced by selected fine material, and in backfilling no material shall be placed immediately around the pipe, that would not insure uniform pressure on the pipe. The earth covering above the pipe shall not be less than 8 inches deep.

Basis of Payment.—All pipe culverts will be paid for by the lineal foot in place at the respective prices bid for the different kinds of pipe. These prices shall be payment in [fol. 36] full for all pipe, joint, materials, etc., and for all

labor employed in laying the pipe, connecting the joints and backfilling, but will not include payment for excavation nor for concrete or masonry end walls.

Concrete Structures

Portland cement concrete structures shall be built where called for on the plans, or directed in writing by the engineer.

Classes of Concrete.—In general, only three (3) classes of concrete will be used. Special structures requiring other classes of concrete than those provided for below, or requiring modifications in the materials used, will be provided for by means of detail plans or detail specification clauses hereinafter given and covering each particular kind of special structure.

Class A concrete shall consist (by volume) of one (1) part cement, two (2) parts sand and four (4) parts of coarse aggregate; the latter ranging in size uniformity from ¼ inch up to 1 inch. All reinforced concrete, culvert tops and plain concrete, eight (8) inches or less in thickness, shall be of Class A concrete.

Class B concrete shall consist (by volume) of one (1) part of cement, two and one-half (2½) parts of sand and five (5) parts of coarse aggregate; the latter ranging in size uniformly from ¼ inch to 2½ inches. Abutments, retaining walls, end walls of culverts and other work as specified, shall be of Class B concrete.

Class C concrete shall consist (by volume) of one (1) part of cement, three (3) parts of sand and six (6) parts of coarse aggregate; the latter ranging in size uniformly from ¼ inch up to 2½ inches. Culvert floors, footings of abutments and retaining walls, and other work as specified shall be of Class C concrete.

Concrete Materials.—The materials used in the various classes of concrete shall be specified below:

Portland Cement.—All Portland cement shall meet the requirements of the United States Bureau of Standards, Circular 33. Portland Cement for all classes of concrete shall meet the requirements of Standard Specifications and Tests for Portland Cement, of the American Society for

Testing Materials; Serial designation 79-17 adopted 1904 and revised 1916.

[fol. 37] Sand.—The sand for all classes of concrete shall consist of clean, hard, durable, uncoated stone particles, preferably siliceous, free from organic matter and lumps of clay. It shall be graded from coarse to fine so that all will pass a ¼ inch mesh screen, not more than 25 per cent shall pass a 50 per mesh sieve, and more than 5 per cent shall pass a 100 mesh sieve. It shall contain not more than three per cent of material removable by the elutriation test.

When the sand is mixed with Portland cement, in the proportion of one (1) part of cement to three (3) parts of sand, by weight according to standard methods of making 1.3 mortar briquets, the resulting mortar, at the ages of both 7 and 28 days, when compared with mortar mixed at the same time in the same proportions and consistency using the same cement with Ottawa sand. shall show a tensile strength ratio of one hundred (100) per centum, except that sand giving a strength ratio of less than one hundred (100) per centum but not less than eighty-five (85) per centum will be accepted for use in concrete, subject to the use of additional cement. The additional proportion of cement required will be determined by laboratory tests and shall be the percentage required to increase the said ratio to one hundred (100) per centum.

Coarse Aggregate.—The coarse aggregate for all classes of concrete shall consist of clean, hard, durable, crushed -tone or gravel, free from any coating of clay or slime. Material containing organic matter, shale, distintegrated or rotten boulders, clay, or other deleterious substance, may be rejected by the engineer without testing.

For Class A concrete the coarse aggregate shall be such that all will pass a screen having one-inch openings, and be retained on a ¼ inch screen, having no intermediate sizes removed.

For Class B and Class C concrete the coarse aggregate shall be such that all will pass a screen having 2½ inch circular openings, and be retained on a one-quarter inch screen, having no intermediate sizes removed.

For all classes of concrete, the coarse aggregate shall be well graded in size particles between the upper and lower limits specified.

With the approval of the engineer boulders and large fragments of rock may be imbedded in Class C concrete. Each stone before being imbedded or placed shall be washed [fol. 38] clean of all clay, dirt or other deleterious matter, and only sound, tough stone shall be used. No boulders shall be placed closer to each other, or to any part of the forms, than 3 inches. Each stone shall be thoroughly soaked before being placed.

Water.—The water used in mixing concrete shall be fresh and reasonably clear, free from oil, acid, alkalies, and organic matter.

Forms.—The forms shall be well built, substantial, and unyielding, and securely braced or tied together by wire or rods so that the finished concrete shall conform accurately to the dimensions and shapes shown on the plans. They shall be sufficiently tight to prevent the leakage of mortar. If the forms bulge or sag at an point when the concrete is placed in them, the portion of concrete causing the distortion shall be immediately removed and the forms properly repaired and strengthened before continuing the work. For all exposed concrete surfaces the form lumber shall be dressed. Suitable mouldings shall be placed in the forms to make beveled corners and filleted angles on the concrete wherever corners and angles are necessary. Forms shall be smooth and clean when the concrete is placed against them and shall be built in such manner that they may be conveniently removed without injury to the concrete.

Removal of Forms.—All forms shall be left in place not less than 12 hours. Centers shall not be struck from under arches and spans having beams or girders in less than 28 days, except in the case of arch culverts or less than 10 foot span.

In general, forms shall not be removed from concrete, including arches of less than 10-foot span, in less than 21 days of good settting weather at a temperature over 50 degrees Fahr.

Forms shall not be removed from under concrete which has been placed at a temperature under 50 degrees Fahr., without first determining if the concrete has properly set, without regard to the time element.

Forms shall always be removed from columns before removing shores from beneath beams and girders, in order to determine the condition of the column concrete.

No forms whatever shall be removed at any time without first notifying the engineer in charge, who will ascertain if [fol. 39] the concrete be set sufficiently hard and so notify the Contractor.

Construction Methods

Mixing.—Unless hand-mixing is specifically permitted by the engineer, the mixing shall be done in a batch mixer of approved type which will insure the uniform distribution of the materials throughout the mass, so that the mixture is uniform in color and smooth in appearance. The mixing shall continue for a minimum time of two (2) minutes after all the ingredients are assembled in the drum, during which time the drum shall revolve at the speed for which it was designed, but shall not make less than fourteen (14) nor more than twenty (20) revolutions per minute. The entire contents of the drum shall be discharged before any materials are placed therein for the succeeding batch.

When it is necessary to mix by hand the mixing shall be done on a watertight platform, preferably in the following manner: The sand shall be spread out to a uniform depth, the cement spread evenly over it, and the two mixed until the mass is uniform in color. Over this mixture of sand and cement the stone or gravel shall be spread and water shall be added as the mass is turned over and mixed. The ingredients may be assembled and mixed in other order than the above, but in any case they shall be turned together at least six times and until the mixture is homogeneous in color and appearance.

In any case the resulting mixture must be of uniform consistency and color with the stones thoroughly mixed with the sand, cement and water. The concrete shall be wet enough to flush readily under light tamping, but can be

handled without separation of the coarse aggregate from the mortar. The quantity of water shall be modified as directed by the engineer, to meet the conditions of the work being placed.

Placing.—After the completion of the mixing the concrete shall be deposited in place and rammed, tamped, or otherwise compacted so as to fill the forms completely and to surround all parts of the steel reinforcement. This must be done promptly and all handling or tamping shall be completed before the concrete has acquired an initial set. Conveying concrete in chutes will be permitted, but it shall not be dropped from a greater height than five feet and no method of handling will be permitted which allows the different ingredients to become segregated or partially separated.

[fol. 40] Concrete shall be deposited in horizontal layers of a uniform thickness not exceeding 12 inches. In floor slabs the concrete shall be placed for the full thickness of the slab and its construction carried along in this manner. Before depositing the concrete in the forms, the latter shall be thoroughly clean on the faces adjoining the concrete, and the space to be occupied by the concrete shall be free from dirt, sawdust, and all other material detrimental to concrete. The concrete next to the forms or centers shall be spaded so that sufficient mortar will exude from the mass to form a smooth surface.

Concrete shall not be mixed or deposited when freezing temperature prevails or threatens, and in case freezing weather develops after the concrete is placed, ample provisions shall be made to protect it from freezing until it is at least four (4) days old. Care should be taken to protect concrete against freezing weather which may occur at night.

Concrete shall not be deposited under water except by consent of the engineer and under his immediate supervision. No permission will be given to deposit concrete in running water and where it is deposited in still water a tremie or chute shall be used.

Joints.—Expansion joints, to provide for shrinkage and contraction shall be constructed where and as indicated on the plans. Care shall be taken in construction that these

joints are so made as to permit a free movement at the joint when the concrete expands and contracts.

Construction of field joints will be permitted when necessary but must be made in such places and in such manner that they will have the least possible effect on the strength of the structure. Reinformed beams, slabs, girders and other important primary members shall be cast continuously unless field joints are shown in plans. Field joints shall be made with faces at right angles to the direction of stress. No joints shall be made with the concrete sloping to a thin edge. Bulkheads shall be used in constructing all joints, other than horizontal.

When work is suspended and a field joint is to be made, there shall be provisions for bonding subsequent work to that already in place by means of projecting reinforcing rods or suitable grooves.

When the placing of concrete is to be resumed the joint surface of the concrete already in place shall be thoroughly [fol. 41] cleaned of dirt and lattance, well wetted, and then flushed with cement grout. Fresh concrete shall then be placed promptly over the joint thus prepared.

Finish.—Except as otherwise noted on the plans, all surfaces shall have a plain, spaded or troweled finish. All surfaces shall be even and free from voids, with no coarse aggregate showing. Tops of floor slabs and arches shall have a uniformly smooth, dense, floated surface. Exposed surfaces shall be more carefully finished, and shall be uniform and of good appearance. Railings, copings, etc. shall be given particular attention, and finished in the manner indicated on the plans.

Forms covering surfaces which require a careful finish shall be removed as soon as conditions permit and if minor defects are apparent in the finish, the surface may be repaired with cement mortar rubbed on with a wooden float.

Plastered surfaces will not be permitted. Washed, rubbed, or tooled surfaces will not be required unless specified on plans, except where necessary in order to repair plain spaded surfaces that do not conform to the specifications for same.

Protection.—All concrete shall be properly protected from extremes of heat and cold until well seasoned. Sur-

faces exposed to premature drying shall be kept covered and shall be kept damp for at least five days.

Defective Work.—Any defective work discovered after the forms have been removed, shall be removed immediately and renewed. If the surface of the concrete is bulged, uneven, or shows excess honeycombing or form joint marks, which, in the opinion of the engineer, cannot be repaired satisfactorily, the entire section shall be removed or renewed. No compensation will be allowed for the work described above.

Basis of Payment.—The bid prices per cubic yard, for the various classes of concrete, will be payment in full, for all concrete materials, forms, labor, and incidental expenses entering into concrete construction, and will also include the placing of all pipes, conduits, anchors, bolts, grillages and other similar material; except that wherever reinforcing steel is called for on the plans, it will be paid for separately from the concrete, as provided below. The use of reinforcing steel, however, will not serve to change the rate of payment for the various classes of concrete in [fol. 42] which the steel may be used. No additional allowance will be made for cofferdams, pumping or bailing, or for any material or labor on account of water.

Pit Run Aggregate.—With the approval of the engineer, end walls of culverts, and footings of abutments and retaining walls may be constructed of pit run aggregate provided tests of such aggregate indicate that the proportions of coarse and fine materials do not vary more than 10% from the proportions herein specified for classes B and C concrete.

Reinforcement

Description.—All reinforcement for concrete structures shall consist of deformed or plain bars, expanded metal or wire cloth, or structural steel shapes, unless otherwise specified.

Deformed and Plain Bars.—All deformed and plain bars shall be made of mild or medium open hearth steel and shall be free from dirt, oil, paint, grease, mill-scale or loose thick rust. High carbon or rerolled steel shall not be used.

All bars shall be capable of bending cold through one hundred and eighty (180) degrees around their own diameter without fracture and must have a yield point of not less than thirty-three thousand (33,000) pounds per square inch. When the length of reinforcing bars is such as to require splicing, they shall be lapped for a distance of forty—(40) diameters for deformed bars, and fifty (50) diameters for plain bars. They may be securely fastened together by means of metal clips, bolted around the bars, and if not so clipped they shall be placed one (1) inch apart. The sizes shown on the plans are in all cases for the side of a square bar. If other sections are used the area shall be equivalent to that indicated. On all deformed bars the minimum sectional area of the bar will be counted, not the average.

Expanded Metal or Wire Cloth.—Expanded metal or wire cloth shall be in accordance with Standard Specifications of the American Society for Testing Materials, standard specifications for concrete Billet Steel Reinforcement Bars, Serial Designation A15-14, and shall be free from dirt, oil, grease, scale or rust.

Structural Steel Shapes.—Structural steel shapes used for reinforcement shall be in accordance with Standard Specifications of the American Society for Testing materials, standard specifications for structural steel for bridges. Serial Designation A7-16.

[fol. 43] Placing Reinforcement.—All reinforcement shall be placed accurately as shown on the plan, and at each intersection rods shall be securely fastened together with wire or metal clips. All the reinforcements necessary for a section of concrete shall be placed and approved before concrete is deposited in the section, and care shall be observed not to disturb it during the placing of the concrete.

Basis of Payment.—This material will be paid for at the contract unit price per pound as per square foot, as the case may be for "Deformed Steel Bars," "Plain Steel Bars," "Expanded Metal" or "Wire Cloth," or "Structural Steel Shapes," complete in place, which price will include furnishing and placing the material and all equipment, tools, labor and work incidental thereto. No allowance will be made for the clips, wire or other mechanical means used for fastening reinforcement in place.

Rubble Masonry

Dry Rubble Masonry:

Description.—Dry rubble masonry shall be composed of approved rubble stone laid without the aid of mortar so as to fit nearly and firmly, and shall be constructed in such sections and at such places as indicated on the plans and where directed in accordance with these specifications.

Stone.—All stone for this work shall be rubble stone of approved quality, sound, free from structural defects, earth, clay or other foreign substances, and from which all weak points and angles have been removed. Selected stones, roughly squared and pitched to line, shall be used at all angles and ends of walls. The stones for the faces of the wall shall not be less than six (6) inches thick nor less than twelve (12) inches in length. The width shall not be less than the thickness, and the volume shall not be less than one-half (½) cubic foot. Small stones of similar quality may be used for pinning and for the interstices in the heart of the wall.

Construction Methods.—All dry rubble masonry shall be constructed by men experienced in this class of work. All stone shall be laid on their natural beds in courses, breaking vertical joints at least six (6) inches. The stones shall be dressed to a reasonably true face and bed and shall be laid to the shapes and dimensions shown on the plans for the structure. No face joint shall exceed two (2) inches on its greatest width of opening. Headers shall be distributed uniformly through the walls of the struc- [fol. 44] tures, so as to form at least one-fifth (⅕) of the exposed faces, and shall extend through the face wall and into the backing a distance at least equal to their thickness. Where a wall is less than two feet in thickness, the headers shall extend entirely through from front to back face. Where the wall is more than two (2) feet thick the headers shall extend either entirely through, or everlap at least 6 inches. The foundation courses shall be of large stones not less than eight (8) inches in thickness and containing not less than six (6) square feet area of bed. The thinnest courses invariably shall be placed towards the top of the wall. The stones shall be laid so as to form a substantial

wall and shall fit neatly. No spalls shall be used in the front or face wall, but all interstices in the heart of the wall shall be filled with spalls. The top of the wall shall be finished with a stone coping of roughly scappled stones six (6) inches thick, and fourteen (14) inches wide and not less than twenty-four (24) inches in length.

Refilling.—The excavated areas which are not occupied by the masonry structure shall be refilled with acceptable material in layers of not more than six (6) inches in depth. Each layer shall be tamped thoroughly and until the refilling is level with the original ground.

Basis of Payment.—This work will be measured in accordance with dimensions shown on the plans, except where changes are ordered during construction, and will be paid for at the contract unit price per cubic yard for "Dry Rubble Masonry" complete in place, which place will include all materials, equipment, tools, labor and work incidental thereto.

Cement Rubble Masonry.—Structures of cement rubble masonry shall be built where called for on the plans, or directed in writing by the engineer.

Materials.—The Portland Cement, sand and water for the mortar, shall be such as to conform with the respective requirements for these materials as contained in the specifications hereinbefore given for Portland cement concrete. The stone shall be sound and durable, and shall be free from rounded, worn or weathered surfaces. No stone shall be used which has a minimum thickness of less than 5 inches, a minimum width of less than 12 inches, or which is less than ½ or one cubic foot in volume.

Construction.—All rubble masonry shall be constructed by experienced masons and the engineer may require the [fol. 45] contractor to produce evidence that the men he employs on such work have had satisfactory previous experience. The stones shall be dressed to a reasonably true face and bed, and shall be laid true to the shape and dimensions of the structure, as shown on the plans. They shall be bedded in Portland Cement mortar, mixed in the proportion of 1 part of cement to 3 parts of sand, and

shall be so placed as to break joints and form to form at least ⅓ of the exposed faces. They shall be of such lengths as to extend through the face wall and into the backing a distance at least equal to the thickness of the headers, and where a wall is less than twenty inches in thickness, the headers shall extend entirely through from front to back face. The interior of the walls shall be built up so that no open spaces will be left. For this purpose mortar and spalls may be used in reason, though sufficient larger stone shall be used to keep the work thoroughly bonded. No spalls shall be used in the face of a wall, and the face stones shall be so well bedded that none will be needed. Walls shall be provided with "weep holes" wherever these are called for on the plans or directed by the engineer. Where no coping is called for on top of a wall, the top course shall be selected stones, such that only transverse joints will occur in the course.

After the stone is all laid as above specified, the face joints shall be thoroughly cleaned of all mortar to a depth of 1 inch. The joints shall then be soaked with water and painted with Portland cement mortar, mixed in proportion of 1 part of cement to 1 part of sand. No pointing shall be done in freezing weather.

Basis of Payment.—Cement rubble masonry will be paid for at the bid price per cubic yard, which shall be payment in full for all materials, labor and incidentals entering into such construction. In determining the volume of masonry structures the plan dimensions will be used, and no allowance will be made for work done outside the neat lines indicated on the drawings.

Concrete Bridges

Substructures and Reinforced Concrete Superstructures

Excavation:

1. Description.—Excavation shal consist of the removal of the old structure, unless otherwise specified, including the abutments, piers, and wings, and all other materials, [fol. 46] obstructions, etc., necessary to the placing of concrete and masonry foundations for structures, stream

changes, waterways, etc., in conformity with the plans or as may be directed. It shall include all clearing and grubbing the removal of necessary materials, furnishing and placing of cofferdams, etc., refilling the excavated area around the structures to the elevation of the original adjacent surfaces after the concrete or masonry has been placed, shaping and sloping, and the disposal of the surplus material; all of which shall be done in accordance with the dimensions given and in conformity with these specifications.

2. Removal of Excavation.—The contractor shall notify the Engineer a sufficient time in advance of the beginning of excavation for structures, stream changes, waterways, etc., so that the cross-sectional elevations and measurements may be taken of the existing ground and structure. Any materials removed or excavated before these measurements have been taken may not be paid for. Any stone in the abutments, piers and wing walls which is to be torn out and which is suitable for use in the new work shall become the property of the Contractor, unless otherwise specified, and the removal of any such material in the substructure will be considered as excavation.

Timber and metal cofferdams, when used, shall be sunk to a depth well below the bottom of the excavation, shall be substantially braced in all directions and of such construction as will permit them to be pumped free of water and kept free until the concrete has set. They shall be of such size that leakage can be kept out of the concrete or masonry area. Unless otherwise shown on the plan or agreed upon, cofferdams and all sheeting and bracing shall be removed after the completion of the concrete or masonry. When the bottom is of sandy or other porous material which will not, in the opinion of the Engineer, permit the cofferdam to be pumped dry, when excavated to the correct elevation, it shall be sealed with sufficient concrete so that it may be pumped dry. This concrete shall be proportioned as directed and shall have twenty-five per cent of additional cement as herein provided for concrete placed under water.

3. Refilling.—After the structure has been completed the areas around the walls shall be filled with approved material in layers of not more than six (6) inches in depth and compacted satisfactorily to the level of the original surrounding surfaces. Materials which will not compact [fol. 47] readily shall not be used in this work. In no case shall surplus material be dumped in the channell of the stream.

4. Method of Determining Excavation Quantities.—All excavations will be measured in its original position by the cross-section method, to ascertain the amount of material removed, which cross-sections will include the removal of all concrete and masonry walls, etc. No allowance will be made for foundation excavation in excess of one (1) foot beyond the outer limits of the foundations. Clearing and grubbing and the removal of obstructions, etc., will not be measured, but will be included in the price for excavation.

"Dry Excavation" shall include all materials excavated above the actual elevation of the water line at the time the work is started.

"Wet Excavations" shall be measured from the water line at the time the work is started to the bottom of the foundation.

5. Basis of Payment.—This work will be paid for at the contract unit price per cubic yard for "Dry excavation" or "Wet excavation," as the case may be, which price will include the removal of the excavated material, refilling, disposal of surplus material and all equipment, machinery, tools, labor and work incidental thereto. No additional compensation will be made for clearing and grubbing, cofferdams, bracing, shoring, pumping or bailing, or for any materials or labor necessary on account of water.

Cement Concrete

Cement Concrete:

6. Classes of Concrete.—In general, only three (3) classes of concrete will be used. Special structures requiring other classes of concrete than those provided for below, or requiring modifications in the materials used, will

be provided for by means of detail plans or detail specification clauses hereinafter given and covering each particular kind of special structure.

Class A concrete shall consist (by volume) of one (1) part cement, two (2) parts sand and four (4) parts of coarse aggregate; the latter ranging in size uniformly from ¼ inch up to 1 inch. All reinforced concrete, culvert tops and plain concrete, eight (8) inches or less in thickness, shall be of Class A concrete.

Class B concrete shall consist (by volume) of one (1) part of cement, two and one-half (2½) parts of sand and [fol. 48] five (5) parts of coarse aggregate; the latter ranging in size uniformly from ¼ inch to 2½ inches. Abutments, retaining walls, end walls of culverts and other work as specified, shall be of Class B Concrete.

Class C concrete shall consist (by volume) of one (1) part of cement, three (3) parts of sand and six (6) parts of coarse aggregate; the latter ranging in size uniformly from ¼ inch to 2½ inches. Culvert floors, footings of abutments and retaining walls, and other work as specified shall be of Class C concrete.

7. Concrete Materials.—The materials used in the various classes of concrete shall be as specified below:

Portland Cement.—All Portland cement shall meet the requirements of the United States Bureau of Standards, Circular 33. Portland cement for all classes of concrete shall meet the requirements of the Standard Specifications and Tests for Portland Cement, of the American Society for Testing Materials; Serial designation 79-17 adopted 1904 and revised 1916.

Sand.—The Sand for all classes of concrete shall consist of clean, hard, durable, uncoated stone particles, preferably siliceous, free from organic matter and lumps of clay. It shall be graded from coarse to fine so that all will pass a ¼ inch mesh screen, not more than 25 per cent shall pass a 50 per mesh sieve, and not more than 5 per cent shall pass a 100 mesh sieve. It shall contain not more than three per cent of material removable by the elutriation test.

When the sand is mixed with Portland cement, in the proportion of one (1) part of cement to three (3) parts of sand, by weight, according to standard methods of making

1:3 mortar briquets, the resulting mortar, at the ages of both 7 and 28 days, when compared with mortar mixed at the same time in the same proportions and consistency using the same cement with Ottawa sand, shall show a tensile strength ratio of one hundred (100) per centum, except that sand giving a strength ratio of less than one hundred (100) per centum but not less than eighty five (85) per centum will be accepted for use in concrete, subject to the use of additional cement. The additional proportion of cement required will be determined by laboratory tests and shall be the percentage required to increase the said ratio to one hundred (100) per centum.

Coarse Aggregate.—The coarse aggregate for all classes of concrete shall consist of clean, hard, durable, crushed [fol. 49] stone or gravel, free from any coating or clay or slime. Material containing organic matter, shale, disintegrated or rotten boulders, clay, or other deleterious substance may be rejected by the engineer without testing.

For Class A concrete the coarse aggregate shall be such that all will pass a screen having 1-inch openings, and be retained on a ¼-inch screen, having no intermediate sizes removed.

For Class B and Class C concrete the coarse aggregate shall be such that all will pass a screen having 2½ inch circular openings, and be retained on a one-quarter inch screen, having no intermediate sizes removed.

For all classes of concrete, the coarse aggregate shall be well graded in size of particles between the upper and lower limits specified.

With the approval of the engineer boulders and large fragments of rock may be imbedded in Class C concrete. Each stone before being imbedded or placed shall be washed clean of all clay, dirt, or other deleterious matter, and only sound, tough stone shall be used. No boulders shall be placed closer to each other, or to any part of the forms, than three inches. Each stone shall be thoroughly soaked before being placed.

Water.—The water used in mixing concrete shall be fresh and reasonably clear, free from oil, acid, alkalies and organic matter.

8. Approval of Material Sources of Supply.—Sources of supply of Portland cement and fine coarse aggregate shall

be approved by the Engineer before delivery of materials is started.

On large or important structures samples of concrete materials, or of the concrete may be required for testing. If required, samples of concrete materials for testing purposes shall be supplied to the Engineer free of charge. Such samples shall be submitted far enough in advance of the using of materials to allow the Engineer to forward them to the laboratory for testing. The laboratory will usually need at least ten days for seven-day tests and thirty-one days for twenty-eight-day tests.

Cylinders of concrete from these samples made and tested in accordance with methods prescribed by the Engineer shall develop compressive strengths as follows:

[fol. 50] Crushing Strength in Pounds per Square Inch

	Mix		
	1, 2, 4	1, 2½, 5	1, 3, 6
Age seven (7) days	1,600	1,300	1,000
Age twenty eight days	2,000	1,600	1,300

If the specimens fail to fulfill the requirements for seven (7) day tests the concrete may be accepted, if specimens fulfill the requirements for twenty eight day tests.

9. Falsework.—Falsework shall be built on good firm foundation and be of sufficient strength to carry the loads without appreciable deformation. It shall be constructed with 1 20-inch camber for each foot of span, and, if necessary, wedges shall be kept driven as the weight of concrete is added so that the bottom of the slab will not drop below the lines shown on the plans. If appreciable settlement occurs in the false work the engineer shall stop the work and require a thorough remodeling to insure a first-class product. For continuous girders and large structures or when trussed centers or special means of support other than ordinary falsework are to be used detail drawings of same shall be submitted for approval.

10. Forms.—Forms shall be so designed and constructed that they may be removed without injuring the concrete.

The material to be used in the forms for exposed sur-

faces shall be sized and dressed lumber, not less than 1½ inches in thickness, or metal in which all bolt and rivet heads are countersunk, so that in either case a plain, smooth surface of the desired contour is obtained. Undressed lumber may be used for backing or other exposed surfaces.

The forms shall be built true to line, and braced in a substantial and unyielding manner. They shall be mortar tight and, if necessary to close cracks due to shrinkage, shall be thoroughly soaked with water. Forms for re-entrant angles shall be chamfered and four corners shall be filleted. Dimensions affecting the construction of subsequent portions of the work shall be carefully checked after the forms are erected and before any concrete is placed. The interior surfaces of the forms shall be adequately wetted or oiled. Form lumber which is to be used a second time shall be free from bulge or warp and shall be thoroughly cleaned. The forms shall be inspected immediately preceding the placing of concrete, any bulging or warping [fol. 51] shall be remedied and all dirt, saw dust, shavings, or other debris within the forms shall be removed.

11. Removal of Forms.—All forms shall be left in place not less than 12 hours. Centers shall not be struck from under arches and spans having beams or girders in less than 28 days, except in the case of arch culverts of less than 10-foot span.

In general, forms shall not be removed from concrete, including arches of less than 10 foot span, in less than 21 days of good setting weather at a temperature over 50 degrees Fahr.

Forms shall not be removed from under concrete which has been placed at a temperature under 50 degrees Fahr., without first determining if the concrete has properly set, without regard to the time element.

Forms shall always be removed from columns before removing shores from beneath beams and girders, in order to determine the condition of the column concrete.

No forms whatever shall be removed at any time without first notifying the engineer in charge, who will ascertain if the concrete be set sufficiently hard and so notify the contractor.

The minimum time for the removal of forms (not the supporting shores) shall be as follows:

For bottom of slab four days for spans 4 ft. or less plus 1 day extra for each additional foot of span.

For sides of beams and girders 7 days.

For columns and piers 4 days.

For bridge arches 28 days.

For monolithic piers and abutments 36 hours.

The minimum time for the removal of shores shall be as follows:

For bottoms of beams and girders 21 days for spans of 10 ft. or less plus 1½ days for each additional foot of span.

The original shores must in no case be taken down, replaced or disturbed until permitted by the Engineer in charge.

[fol. 52] Construction Methods

12. Mixing.—Unless hand-mixing is specifically permitted by the Engineer, the mixing shall be done in a batch mixer of approved type which will insure the uniform distribution of the materials throughout the mass, so that the mixture is uniform in color and smooth in appearance. The mixing shall continue for a minimum time of two (2) minutes after all the ingredients are assembled in the drum, during which time the drum shall revolve at the speed for which it was designed, but shall make not less than fourteen (14) nor more than twenty (20) revolutions per minute. The entire contents of the drum shall be discharged before any materials are placed therein for the succeeding batch.

When it is necessary to mix by hand the mixing shall be done on a watertight platform, preferably in the following manner; the sand shall be spread out to a uniform depth, the cement spread evenly over it, and the two mixed until the mass is uniform in color. Over this mixture of sand and cement the stone or gravel shall be spread and water shall be added as the mass is turned over and mixed. The ingredients may be assembled and mixed in other order than the above, but in any case they shall be turned together at least six times and until the mixture is homogeneous in color and appearance.

In any case the resulting mixture must be of uniform consistency and color with the stones thoroughly mixed with the sanem cement and water. The concrete shall be wet enough to flush readily under light tamping, but can be handled without a separation of the coarse aggregate from the mortar. The quantity of water shall be modified as directed by the engineer, to meet the conditions of the work being place-.

13. Placing.—After the completion of the mixing the concrete shall be deposited in place and rammed, tamped, or otherwise compacted so as to fill the forms completely and to surround all parts of the steel reinforcement. This must be done promptly and all handling or tamping shall be completed before the concrete has acquired an initial set. Conveying concrete in chutes will be permitted, but it shall not be dropped from a greater height than 5 feet and no method of handling will be permitted which allows the different ingredients to become segregated or partially separated.

Concrete shall be deposited in horizontal layers of a uniform thickness, not exceeding 12 inches. In floor slabs the [fol. 53] concrete shall be placed for the full thickness of the slab and its construction carried along in this manner. Before depositing the concrete in the forms, the latter shall be thoroughly clean on the faces adjoining the concrete, and the space to be occupied by the concrete shall be free from dirt, sawdust, and all other material detrimental to concrete. The concrete next to the forms or centers shall be spaded so that sufficient mortar will exude from the mass to form a smooth surface.

Concrete shall not be mixed or deposited when freezing temperature prevails or threatens, and in case freezing weather develops after the concrete is placed ample provision shall be made to protect it from freezing until it is at least four (4) days old. Care should be taken to protect concrete against fre-zing weather which may occur at night.

Concrete shall not be deposited under water except by consent of the engineer and under his immediate supervision. No permission will be given to deposit concrete in running water and where it is deposited in still water a tremie or chute shall be used.

14. Joints.—Expansion joints to provide for shrinkage and contraction shall be constructed where and as indicated on the plans. Care shall be taken in construction that these joints are so made as to permit a free movement at the joint when the concrete expands or contracts.

Construction of field joints will be permitted when necessary but must be made in such places and in such a manner that they will have the least possible effect on the strength of the structure. Reinforced beams, slabs, girders and other important primary members shall be cast continuously unless field joints are shown in plans. Field joints shall be made with faces at right angles to the direction of stress. No joints shall be made with the concrete sloping to a thin edge. Bulkheads shall be used in constructing all joints, other than horizontal.

When work is suspended and a field joint is to be made, there shall be provision for bonding subsequent work to that already in place by means of projecting reinforcing rods or suitable grooves.

When the placing of concrete is to be recsumed the joint surface of the concrete already in place shall be thoroughly cleaned of dirt and lattance, well wetted, and then flushed with cement grout. Fresh concrete shall then be placed promptly over the joint thus prepared.

[fol. 54] 15. Finish.—Except as otherwise noted on the plans, all surfaces shall have a plain spaded or troweled finish. All surfaces shall be even and free from voids, with no coarse aggregate showing. Tops of floor slabs and arches shall have a uniformly smooth, dense, floated surface. Exposed surfaces shall be more carefully finshed and shall be uniform and of good appearance. Railings, coping, etc., shall be given particular attention, and finished in the manner indicated on the plans.

Forms covering surfaces which require a careful finish, shall be removed as soon as conditions permit and if minor defects are apparent in the finish, the surface may be repaired with cement mortar rubbed on with a wooden float.

Plastered surfaces will not be permitted. Washed, rubbed, or tooled surfaces will not be required unless specified on plans, except where necessary in order to repair plain spaded surfaces that do not conform to the specifications for same.

Concrete Railings

16. Description.—Parapets and railings for Bridges, Wing Walls, Retaining Walls, etc., shall include all work erected above the top of the curb for the protection of traffic.

Materials.—Unless otherwise noted, railings shall be constructed of Class A concrete and the materials shall fulfill the requirements for materials for Class A Concrete, except as may be modified by special clauses or notes on the plans.

Construction Methods.—For "cast in place" railings the forms shall be made of good quality tongued and grooved lumber and be of first class workmanship throughout. They shall be accurately built to the designs and dimensions shown on the planes, and all mouldings, panel work, and bevel strips shall be straight and true with neatly mitered joints. Forms shall be erected to exact line and grade and be so rigidly braced that they will maintain true alignment during the placing of concrete. Each section of the work shall be cast complete to one and one-half (1½) inch below the top of a single operation. The top shall be finshed with one and one-half (1½) inches of mortar, of the same mix as used in the concrete, struck off with a templet moved on guides attached to the forms. This mor- [fol. 55] tar shall be placed within ten (10) minutes after the concrete is deposited. Railings shall be very carefully finished, the forms shall be carefully removed as soon as possible (in not less than 12 nor more than 48 hours) and all porous spots and places damaged in removing the forms repaired and the entire surface rubbed with clean water and a wooden float until all form marks are removed and the surface assumes a uniform sandy appearance.

Precast railings shall be made in accordance with the designs and dimensions shown on the plans or as directed, and shall be erected true to line and grade in a thoroughly workmanlike manner. The members shall be straight and true to form and free from imperfections or damaged places. They shall be set in place in full beds of 1 to 3 mortar, and shall be thoroughly bonded together as shown on the plans as directed.

17. Pipes and Conduits.—Pipes and conduits which are to be encased in the concrete as shown on the plans, shall be placed by the Contractor during construction. They will be delivered to the Contractor, unless otherwise stated, at the site of the structure. No compensation will be made for placing them except that no deductions will be made for the volume occupied.

18. Drainage and Weep Holes.—Drainage and weep holes shall be constructed in the manner and where indicated on the plans, or directed, and no additional allowance will be made for such work, except that no deduction will be made for such openings in payment for concrete.

19. Defective Work.—Any defective work discovered after the forms have been removed, shall be removed immediately and renewed. If the surface of the concrete is bulged, uneven, or shows excess honey-combing or form joint marks, which, in the opinion of the engineer, cannot be repaired satisfactorily, the entire section shall be removed and renewed. No compensation will be allowed for the work described above.

20. Measurements of Concrete.—All concrete shall be classified as shown on the plans unless changes are ordered during construction. All plain concrete in piers, abutments and wings and other walls shall be measured in accordance with the dimensions shown on the plans, unless changes are ordered during construction, except that no deductions shall be made for paneling in this class of work. All rein- [fol. 56] forced concrete, such as beams and girders, spandrel walls, water tables, parapets, coping, etc., shall be measured as described above for plain concrete and if panelling is not more than six (6) inches in width, no deductions will be made. In hand railing, if the rail is of an open type, that is, alternate solid and open spaces, it will be measured as if no openings existed.

21. Basis of Payment.—The bid prices per cubic yard, for the various classes of concrete, will be payment in full, for all concrete materials, forms, labor and incidental expenses entering into concrete construction, and will also include the placing of all pipes, conduits, anchors, bolts, grillages, and other similar materials; except that wher-

ever reinforcing steel is called for on the plans, it will be paid for separately from the concrete, as provided below. The use of reinforcing steel, however, will not serve to change the rate of payment for the various classes of concrete in which the steel may be used. No additional allowance will be made for coffer-dams, pumping or bailing, or for any material or labor on account of water.

22. Loads and Stresses.—For concrete and reinforced concrete highway bridges the loads shall be assumed as given in the specifications for Steel Highway Bridges of the Wyoming State Highway Department.

23. Calculations.—Calculations shall be made with reference to working stresses and safe loads, rather than with reference to ultimate strength and ultimate loads.

Initial stress in reinforcement due to contraction or expansion shall be neglected.

24. Unit Stresses.—All parts of the reinforced concrete structure shall be so proportioned that the sum of the maximum stress from all causes shall not exceed for 1;2;4 concrete the following value in pounds per square inch:

Axial Tension	None
Bearing (surface of twice the loaded area)	650
Axial Compression (plain column pier)	450
Columns with longitudinal reinforcement and with hoops	650
Compression on Extreme fiber	650
Shear (without web reinforcement)	40
(Thoroughly reinforced with web reinforcement)	120
Bond (concrete and plain rods)	80
(Concrete and drawn wire)	40
(Concrete and deformed bars)	100

[fol. 57] The tensile or compressive stress in steel shall not exceed 16,000 pounds per square inch.

For other mixtures than 1;2;4 the above unit stresses for concrete shall be reduced by the following percentages:

For 1;2½;5 concrete	20%
For 1;3;6 concrete	30%

The ratio of the modulus of elasticity of steel to the modulus of elasticity of concrete shall be taken at 15.

In calculating the items in concrete the extreme area of steel shall be equivalent to 15 times its area of concrete.

Concrete Piling

Concrete Piling:

Description.—Piling shall consist of concrete piles made of the dimensions and placed in the location and to the elevation shown on the plans or as directed and in conformity with these specifications.

The contractor shall be responsible for determining the length of piles required, by driving test piles, or otherwise under the requirements herein provided.

Testing.—If tests are called for in the contract, the contractor shall submit a price per test for testing piles. The number of tests to be determined by the Engineer. Tests shall be made by loading the pile to two times the working load without exceeding a permanent settlement of one-quarter inch in 48 hours unless otherwise specified. In case the safe carrying capacity of any pile is found by test, or by formula if not tested to be less than the load for which it was designed, additional piles shall be driven until the load per pile to be borne is reduced to the safe carrying capacity.

Excavation.—All excavations of the foundation in which piles are to be driven shall be completed before driving is commenced. After driving is completed all loose and displaced materials shall be removed from around the piles, leaving a clean, solid surface to receive the concrete. Piles shall be constructed in accordance with the designs shown on the plan, or if not shown on the plan designs shall be submitted for approval.

Concrete piles shall be made of Class "A" Concrete as specified in Paragraph 94, except that the concrete shall be waterproofed by an approved method.

[fol. 58] Precast Piles.—These shall be made in accordance with the plans, and the reinforcement shall be accurately placed and rigidly secured in such manner as to insure its proper location in the completed pile. The con-

tract shall be carefully placed, tamped and spaded, care being used to fill every part of the form and to work the concrete around and under the reinforcement without displacing it. The piles shall be cast separately, or if alternate piles are cast in a tier, the intermediate piles shall not be poured until four (4) days after the pouring of the adjacent piles. Piles cast in tiers shall be separated by tar paper carefully placed. The concrete shall be poured continuously in each pile. The completed piles must be free from stone pockets, porous spots, or other defects, and be straight and true to the form specified. The forms shall be true to line, built of surfaced lumber, and a one (1) inch chamfer strip shall be used in all corners; they shall be water tight, and shall not be removed within twenty-four (24) hours after the concrete is poured.

All exposed surfaces of the piles shall be given a rubbed finish. The piles shall be cured at least 40 days at a temperature of not less than 40 degrees F., or 30 days at a temperature of not less than 60 degrees F. Piles shall be at least 30 days old when driven. Great care shall be taken that green piles are not injured while curing by improperly supporting, handling, or transporting them.

Driving.—Requirements for driving large concrete piles will be covered by special specificatons. Under usual conditions, that is, piles containing not over two cubic yards of concrete, they shall be driven with drop hammers weighing not less than the pile, or with double acting steam hammers, the total weight of which is not less than two-thirds the weight of the pile. In driving, the tops of the piles shall be protected by suitable cushions of wood, rope, or material so as to reduce the injury of the pile to a minimum. Metal shoes or points of an approved design shall be furnished when ordered by the Engineer. Piles shall be driven to rock until the safe bearing capacity of each pile, as determine*g* by the following formulas, shall equal the loading per mile specified on the plan:

$$P = \frac{2\ W.\ H}{S \times 0.1}$$ for gravity hammers.

$$P = \frac{2\ W\ H}{S \times 0.1}$$ for steam hammers.

[fol. 59] P—Load in pounds.
W—Weight of the falling hammer in pounds.
H—Height of fall in feet.
S—Average penetration in inches by the last three blows.

In case the above result cannot be obtained without injury to the pile or on account of the impracticable lengths required the number indicated on the plans shall be increased until the maximum load coming on any pile shall not exceed its safe carrying capacity as determined by the above formulas. For movable spans, arches, and high abutments the above carrying capacity shall be reduced 20%.

Jetted Piles.—Jetted piles shall extend to a good solid stratum. Their carrying capacity shall be determined by actual tests, or if driven with the aid of a jet and for the last five blows of the hammer, driven without any jet, the same formula may be applied as in the case of driven piles. If jet pipes are embodied in concrete piles they shall be filled with cement grout 1;2 mix.

Piles Cast in Place.—When piles are cast in a strong metal shell, which is previously driven to refusal and which remains in place after the concrete has set, the safe loads when piles are completely embedded in firm earth may be taken the same as specified above for driven reinforced concrete piles.

Piles cast in place without metal reinforcement shall not be used in water or in ground so soft, in either wet or dry condition as not to give firm lateral support. No pile of this type shall be concreted until all driving within a radius of six feet has been completed, and care shall be taken that the piles are in no way disturbed until the concrete has become hard.

Basis of Payment.—This work will be paid for at the contract unit price per linear foot for concrete piles complete in place, which price will include all materials, equipment, tools, labor and work incidental thereto. Payment will be made for the actual number of feet of piles left in place and no allowance will be made for any piles which are not driven in accordance with the specifications, or as ordered by the Engineer and acceptable to him.

Special Notice to Contractors

Contractor will be allowed on monthly estimates payment for iron, steel, cement and piling furnished, provided the same are stored so as to prevent damage from exposure to [fol. 60] the elements or from any other cause, and provided also that contractor furnishes a receipted invoice for such material. Payment shall be based upon unit prices determined by the Engineer.

Employment of Labor

"In the employment of labor, in the performance of this contract, preference shall be given, other conditions being equal, to honorably discharged soldiers, sailors, and marines, but no other preferences or discriminations among citizens of the United States shall be made. (Section 6, of the Act of Congress approved February 28, 1919, entitled 'An Act making appropriations for the service of the Post Office Department for the fiscal year ending June 30, 1920, and for other purposes'—Public No. 299, 65th Congress.)"

The entire project has been divided into Sections B. C. and D. as shown on the plans and bids may be submitted for any or all sections. Comparison of bids will be made by sections and the right is reserved to award the contract to the lowest bidder on each section.

Special Notice to Contractors

Workingman's Compensation

1. The Workingmen's Compensation Law (Chapter 124 Session Laws 1915) provides compensation for injuries or death resulting from injuries, of workmen from accident occurring in extra hazardous employment.

2. If you do not have a copy of this law take — up with the Engineer in charge or the State Treasurer who will see you are provided with same.

3. Section 23 of this act makes the State Highway Superintendent responsible to the extent of seeing that Contractors make monthly payment to the Compensation Fund.

4. Report on Pay Roll Form accompanied by check or draft payable to State Treasurer should be made for extra hazardous occupation on each project. Same to be sent to the District Engineer in whose district you have contract, on or before the fifteenth of each month following that for which report is made. Payment will be transmitted to State Treasurer through this office.

5. Employer's Report of accident must be filed within twenty days after accident. Employees are entitled to file their report of all injuries received while in your employ. [fol. 61] Such should be explained to the workmen as it increases their efficiency.

6. For convenience all Dist. Engineers have complete supply of forms such as Pay Roll and Injury Reports.

7. All payments and reports to Workingmen's Compensation must be rendered before final estimates can be paid.

Fed. Aid No. 118, Sec. "B"

State No. —

Proposal to the State Highway Commission of Wyoming for the construction of grading and culvert construction on 1.95 miles of the Wind River Canyon (Section B) Road in Fremont and Hot Springs County, as shown on drawings and plans or file

GENTLEMEN: The undersigned, as bidder, hereby certified that — ha- examined the location of the proposed work, and the plans, specifications and contract governing the same, that this bid is made without connection with any person, persons or corporation making any other bid for the same purpose, and is in all respects fair and without collusion or fraud; and hereby proposed — to furnish all labor, tools, materials, supplies, etc. and to sustain all expense necessary to complete the work embraced in this improvement, or as much thereof as can be completed with the money available, in accordance with the said plans, specifications and contract and the following schedule of approximate quantities, rates and prices, to-wit;

Item No.	Approximate quantity	Items with unit bid price written in words	Unit bid price, Dollars, Cents	Amt. bid, $ C.
1	2,210	Backfill in rock cuts Cubic yds. at Thirty-five cents per backfill rock cut	.35	
4	300	Cubic yards station overhaul on roadbed excavation at .16 per cubic yard station	.16	
[fol. 62]				
19	604	Lineal feet, furnishing in place including excavation and backfilling, 15-inch corrugated iron culvert pipe at 1.65 per lineal foot	1.65	
20	134	Lineal feet, furnishing in place including excavation and backfilling, 18-inch corrugated iron culvert pipe at 2.00 per lineal foot	2.00	
23	140	Lineal feet, furnishing in place including excavation and backfilling, 36-inch corrugated iron culvert pipe at 3.75 per lineal foot	3.75	
24	1,660	Cubic yards dry rubble masonry, complete in place at 4.50 per cubic yard	4.50	
40	32	Cubic yards Class B concrete in culvert pipe end walls including excavation and backfill at Twenty-five dollars per cubic yard	25.00	
41	58,300	Cu. Yd. Excavation unclassified at 1.50 per cu. yd	1.50	
44	372	Lin. Ft. Tunnel Exc. at 70.00 per Lin. Ft	70.00	
45	50,000	Cu. Yd. Station Overhaul on backfill in rock cuts at two cents per C. Y	.02	
		Total, $124,371.10.		

The bidder also proposes to perform all extra work on the basis set forth in the speculations on Page 7, under the heading "Additional Work."

The bidder agrees that the quantities for each item, as furnished by the State Highway Engineer, are approxi-
[fol. 63] mate only and subject to increase or decrease, and that he is willing to perform any increased or decreased quantities of work at prices bid per unit. Accompanying this proposal is a Certified Check for — Dollars ($ —) payable to the State Highway Commission of Wyoming, this amount being five per cent 5% of the total bid based upon the approximate estimate of quantities at the above price.

The bidder furthermore agrees in case he should default in executing such contract and bond, within ten days after the acceptance of this bid, that the check accompanying this

bid and the money payable thereon shall become the property of the State of Wyoming as liquidated damages and the said Board may proceed to award the contract to others.

The bidder also agrees to commence work within fifteen days after the execution of said contract and bond, and to complete all of said work on or before the first day of January, 1923.

(Signature of bidder:) Utah Construction Company, by A. H. Christensen, Supt. Business address, Ogden, Utah.

Date: June 1, 1922.

Fed. Aid No. 118-C

State No. —

Proposal to the State Highway Commission of Wyoming for the construction of grading and culvert construction on 9.47 miles of the Wind River Canyon Road, Section "C," in Fremont and Hot Springs County, as shown on drawings and plans or file

GENTLEMEN: The undersigned, as bidder, hereby certifies that — ha- examined the location of the proposed work, and the plans, specifications and contract governing the same, that this bid is made, without connection with any person, persons or corporation making any other bid for the same purpose, and is in all respects fair and without collusion or fraud; and hereby propose- to furnish all labor, tools, materials, supplies, etc., and to sustain all expense [fol. 64] necessary to complete the work embraced in this improvement, or as much thereof as can be completed with the money available, in accordance with the said plans, specifications and contract and the following schedule of approximate quantities, rates and prices, to-wit:

Item No.	Approximate quantity	Items with unit bid price written in words	Unit bid price Dollars, Cents	Amt. b'd. $ c.
1	10,790	Backfill in rock cuts at .35 per cubic yard	.35	
4	400	Cubic yards station overhaul on roadbed excavation at .16 per cubic yard station	.16	
19	1,452	Lineal feet, furnishing in place including excavation and backfilling, 15-inch corrugated iron culvert pipe at 1.65 per lineal foot	1.65	
20	60	Lineal feet, furnishing in place including excavation and backfilling, 18-inch corrugated iron culvert pipe at 2.00 per lineal foot	2.00	
21	100	Lineal feet, furnishing in place including excavation and backfilling — 24-inch corrugated iron culvert pipe at 2.70 per lineal foot	2.70	
22	36	Lineal feet, furnishing in place including excavation and backfilling, 30-inch corrugated iron culvert pipe at 3.00 per lineal foot	3.00	
23	750	Lineal feet, furnishing in place including excavation and backfilling, 30-inch corrugated iron culvert pipe at 3.60 per lineal foot	3.60	
[fol. 65]				
24	3,260	Cubic yards dry rubble masonry, complete in place at 2.00 per cubic yard	2.00	
40	145	Cubic yards Class B concrete in culvert pipe end walls including excavation and backfill at 25.00 per cubic yard	25.00	
42	212,300	C. Y. exc. unclassified at .68½ per cu. yd	.68½	
45	108,000	Cu. Yd. Station overhaul on backfill in rock cuts at .02 per cu. yd	.02	
		165,004.80		

The bidder also proposes to perform all extra work on the basis set forth in the specifications on Page 7, under the heading "Additional Work."

The bidder agrees that the quantities for each item, as furnished by the State Highway Engineer, are approximate only and subject to increase or decrease, and that he is willing to perform any increased or decreased quantities of work at prices bid per unit. Accompanying this proposal is a Certified Check for — Dollars ($—) payable to the State Highway Commission of Wyoming, this amount

being five per cent (5%) of the total bid based upon the approximate estimate of quantities at the above price.

The bidder furthermore agrees in case he should default in executing such contract and bond, within ten days after the acceptance of this bid, that the check accompanying this bid and the money payable thereon shall become the property of the State of Wyoming as liquidated damages and the said Board may proceed to award the contract to others.

The bidder also agrees to commence work within fifteen days after the execution of said contract and bond, and to complete all of said work on or before the first day of January, 1923.

(Signature of bidder:) Utah Construction Company, by A. H. Christensen, Supt. Business address, Ogden, Utah.

[fol. 66] Date: June 1, 1922.

Fed. Aid No. 118-B

State No. —

Proposal to the State Highway Commission of Wyoming for the construction of grading and culvert construction on 2.0 miles of the Wind River Canyon Road (Section "D") in Fremont and Hot Springs County, as shown on drawings and plans or file

GENTLEMEN: The undersigned, as bidder, hereby certified that — ha- examined the location of the proposed work, and the plans, specifications and contract governing the same, that this bid is made without connection with any person, persons or corporation making any other bid for the same purpose, and is in all respects fair and without collusion or fraud; and hereby propose- to furnish all labor, tools, materials, supplies, etc., and to sustain all expense necessary to complete the work embraced in this improvement, or as much thereof as can be completed with the money advailable, in accordance with the said plans, specifications and contract and the following schedule of approximate quantities, rates and prices, to-wit:

Item No.	Approximate quantity	Items with unit bid price written in words	Unit bid price Dollars, Cents	Amt. bid, $ C.
4	300	Cubic yards station overhaul on roadbed excavation at five cents per cubic yard station..	.05	
7	50	Cu. Yds. dry excavation for structures except pipe culverts and head walls One Dollar 25/100 per cubic yard.....	1.25	
[fol. 67] 8	20	Cu. Yds. "Class A" concrete as per plans, complete in place at Twenty-five dollars per cubic yard.....	25.00	
19	104	Lineal feet, furnishing in place including excavation and backfilling, 15 inch corrugated iron culvert pipe at one dollar and 65/100 per lineal foot....	1.65	
20	28	Lineal feet, furnishing in place including excavation and backfilling 18 inch corrugated iron culvert pipe at one dollar and 90/100 per lineal foot....	1.90	
23	26	Lineal feet, furnishing in lace including excavation and backfilling, 36 inch corrugated iron culvert pipe at Three dollars 60/100 per lineal foot.....	3.60	
24	80	Cubic yards dry rubble masonry, complete in place at Four Dollars per cubic yard.....	4.00	
27	2,600	Pounds of deformed steel bars for reinforcement as per plan, including clips, wires, etc. at Seven cents per pound.....	.07	
37	20	Cubic yards wet excavation for structures at Seven dollars per cubic yard.....	7.00	
40	11	Cubic yards Class B. concrete in culvert pipe end walls including excavation and backfill at Twenty-five dollars per cubic yard.....	25.00	
43	16,300	Cu. yd. Excavation unclassified at .18 per cu. yd.....	.17	
		Total $4,971.96		

[fol. 68] The bidder also proposes to perform all extra work on the basis set forth in the specifications on Page 7, under the heading "Additional Work."

The bidder agrees that the quantities for each item, as furnished by the State Highway Engineer, are approximate only and subject to increase or decrease, and that he is willing to perform any increased or decreased quantities of work at prices bid per unit. Accompanying this proposal is a Certified Check for Eighteen Thousand five hundred ($18,500.00) Dollars payable to the State Highway

Commission of Wyoming this amount being five per cent of the total bid based upon the approximate estimate of quantities at the above price.

The bidder furthermore agrees in case he should default in executing such contract and bond, within ten days after the acceptance of this bid, that the check accompanying this bid and the money payable thereon shall become the property of the State of Wyoming as liquidated damages and the said Board may proceed to award the contract to others.

The bidder also agrees to commence work within 15 days after the execution of said contract and bond, and to complete all of said work on or before the first day of January, 1923.

(Signature of bidder:) Utah Construction Company, by A. H. Christensen, Supt. Business address: Ogden, Utah.

Date: June 1, 1922.

Fed. Aid No. 118

State No. —

Contract

This Agreement, made and entered into this 1st day of June, 1922 between the State of Wyoming, acting through the State Highway Commission, and Utah Construction Company, a corporation, of Ogden, in the state of Utah, hereinafter called the Contractor,

Witnesseth: That for and in consideration of the payments, covenants and agreements hereinafter mentioned to be made and performed by the parties hereto, the said parties hereby covenant and agree as follows:

[fol. 69] I. The Contractor, at his own proper cost and expense shall do all work and furnish all labor, materials, tools, except such as are mentioned in the specifications to be furnished by the State of Wyoming, necessary to construct in a good, wokmanlike and substantial manner and to the satisfaction of the State Highway Engineer a portion of the Wind River Canyon Road State Highway in the Counties of Fremont and Hot Springs of Wyoming from

Boysen Dam to Bridge South of Thermopolis, under the direct supervision of the State Highway Commission, subject to inspection at all times and approval by the Secretary of Agriculture pursuant to the provisions of the Act of Congress approved July 11, 1916 (39 U. S. Statutes at Large, page 335) entitled "An Act to Provide that the United States shall aid the States in the Construction of rural post roads, and for other Purposes," and in full compliance with the attached plans and specifications, which are made a part hereof, and with the terms of this agreement and the requirements of the Engineer under it.

II. In consideration of the covenants and agreements to be kept and performed by the Contractor and for the faithful performance of this contract and the completion of the work embraced therein according to the plans, specifications and conditions herein contained and referred to, the State of Wyoming, shall pay and the Contractor shall receive and accept as full compensation for everything furnished and done by the Contractor under this contract and also for all loss or damage arising out of the nature of the work, the action of the elements or from any unforseen contingencies or difficulties encountered in the prosecution of the work, the prices stipulated in the proposal.

III. Time shall be of the essence of this contract on the part of the Contractor and it is hereby agreed by the parties hereto that in case all of the work called for under said contract, in all parts and requirements, is not completed by and at the time herein mentioned or by and at such other time to which the period of completion may be extended, damage will be sustained by the State of Wyoming, and that it is and will be difficult or impossible to ascertain and determine the actual damage which the State will sustain in the event of and by reason of such delay; and it is therefore agreed that said Contractor shall pay to the State of Wyoming, as liquidated damages and not as penalty, an amount equal to the cost of maintaining the necessary force of engineers and inspectors on the work during the additional time, which said amount is hereby agreed upon as the damage that will [fol. 70] be suffered by the State of Wyoming by such failure to complete the work within the time named; and the State Highway Commission may deduct the same from the

amount due or to become due to the Contractor and such payments or deductions shall not in any degree release the Contractor from the further obligations and penalties in respect to the fulfilment of the entire contract, nor any right which the State may have to claim, sue for and recover compensation and damages for non-performance of this contract. No charge will be made by the Contractor for hindrances or delays from any cause whatsoever in the progress of the work but such hindrances or delays may be held as sufficient reason for an extension of the time allowed for the completion of the work.

IV. Said work shall be commenced on or before the 1st day of July, 1922, and shall be completed on or before the 1st day of April, 1925, Provided, however, that should the Contractor be delayed in the prosecution of completion of the work by any act, neglect, or fault of the Commission or by any damage caused by fire, flood or other casualty or by any other cause over which the Contractor has no control, then the time herein set for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid, which extended period shall be determined and fixed by the State Highway Engineer, but no such allowance shall be made unless a claim therefor is presented in writing to the State Highway Engineer within ten (10) days after the occurrence of such delay. All requests for an extension of time must be accompanied by an agreement of the surety on the bond of the Contractor to such extension. The State of Wyoming hereby reserves the right to accept and make use of any portion of said work before the completion of the entire work without invalidating the contract, or binding itself to accept the remainder of the work or any portion thereof whether completed or not.

V. Monthly payments based upon approximate estimate of the amount of and value to the State of expense incurred during the preceding month, as computed by the Engineer, shall be made to the contractor during the progress of the work on or before the 15th day of each calendar month. Provided, that fifteen per cent of the amount of the estimated value of the work done shall be retained until the work is fully completed and accepted by the Engineer. These payments shall not be considered as an acceptance on

[fol. 71] the part of the Engineer of any part of the work done or materials furnished, but simply as a payment on account.

Within a reasonable time after the acceptance of the work according to the contract, the State Highway Engineer shall certify to the Commission a final estimate based upon the quantities measured by the Engineer and computed according to the unit prices hereto attached, showing the total work done or required and the amount due the Contractor therefor. After deducting therefrom all previous payments and any other amounts to be kept and retained under the provisions of this contract, payment in full shall be made to the Contractor; Provided, that before making of such final payment the State Highway Commission may require the Contractor to show to its satisfaction that all just debts due all laborers, mechanics, material, men and persons who have supplied Contractor, or sub-contractor, with materials or goods of any kind for this work, have been paid. All prior partial estimates and payments shall be subject to correction in the final estimate and payment.

VI. And it is also understood and agreed that the advertisement, proposal, bond, specifications and plans, as hereto attached or herein referred to, are all essential documents to this contract and are a part hereof.

VII. And the Contractor further agrees to comply with the provisions of the law known as the Workman's Compensation Act of the State of Wyoming.

(Slip attached:) Notice of Completion.—A notice of completition of all work contracted for shall be given by the contractor ninety (90) days before the final estimate shall be paid to the contractor.

In witness whereof the State of Wyoming, acting through its State Highway Commission, party of the first part, has caused these presents to be executed by its Superintendent and the seal thereof to be hereunto affixed, on the day and year first above written; and the said party of the second part, has caused these presents to be executed and

has hereunto affixed his hand and seal the 3rd day of June, A. D. 1922.

State Highway Commission of Wyoming, by (Sgd.) L. E. Laird, Superintendent. (Seal.) Attest: [fol. 72] (Sgd.) Z. E. Sevison, Secretary. The Utah Construction Company, by (Sgd.) W. H. Wattis, President. (Seal.) Attest: (Sgd.) Warren L. Wattis, Secretary.

EXHIBIT B TO AMENDED PETITION

Supplemental Agreement

Supplementing the contract entered into the 1st day of June, 1922, between the State Highway Commission of Wyoming, and The Utah Construction Company for the construction of the Wind River Canyon road in Fremont and Hot Springs Counties, being Sections B, C and D of Federal Aid Project No. 118, the following facts and conditions are hereby mutually agreed to:

Recitals

In the final location and staking out of Sections B and C, it was found desirable and advantageous to make certain changes in grades and alignments from those shown on the original plans, which changes had been anticipated by both parties, at the time of executing the contract, but the quantities involved were unknown at that time.

It has been found desirable to substitute cement rubble masonry head walls in lieu of concrete headwalls as called for in the contract. The amount of tunnel excavation has been increased to approximately 882 lineal feet, the amount in the original contract being 372 lineal feet. The original contract provides for the use of excavated material from cuts in making fills and the washing of excess material from cuts in the widening of fills in such manner as the engineer may direct. On account of increased quantities of excavation the contract cannot be completed April 1, 1923.

Agreement

Now, therefore, it is mutually agreed by and between the parties hereto as follows:

1. The Utah Construction Company agrees to an increased quantity of unclassified excavation on Section B of [fol. 73] approximately 30,000 cubic yards, and to perform the same at the contract price called for in the original contract.

2. The Utah Construction Company agrees to an increased quantity of unclassified excavation on Section C of approximately 100,000 cubic yards, and to perform the same at the unit price called for in the original contract.

3. The Utah Construction Company agrees to construct cement rubble masonry headwalls at a unit price of $14.00 per cubic yard as covered by letter of November 4, 1922.

4. The Utah Construction Company agrees to complete the increased amount of tunnel excavation at the contract unit price of $70.00 per lineal foot, as covered by letter of July 26, 1922.

5. The State Highway Commission agrees to allow the contractor to waste material from cuts and borrow material outside of the staked cross-sections for fills in order to permit the use of steam shovels for rough grading, provided, however, the basis of payment shall be the excavation quantities determined by the cross section stakes and that borrow outside of the staked slopes is at the contractor's expense, unless such excavated area is used on completed roadway at the time of final acceptance.

It is expected that the contractor will make use of material from cuts to complete the fills so far as possible without being required to obtain special equipment for the purpose, provided, however, that material from cuts shall be used in making fills where most economical to do so.

6. Material excavated by the contractor in sections where the slopes are staked by the engineer will not stand shall be paid for at the unit price and the quantities determined by recross-sectioning the work involved.

7. The State Highway Commission agrees to an extension of time to June 1, 1923.

State Highway Commission of Wyoming. (Signed) L. E. Laird, Superintendent. Attest: (Signed) Z. E. Sevison, Secretary. The Utah Construction Company, by (Signed) A. H. Christensen, Super-
[fol. 74] intendent. Attest: (Signed) Warren L. Wattis, Secretary.

Approved: (Signed) W. H. Wattis, President.

EXHIBIT C TO AMENDED PETITION

Section B

1. Excess quantity excavation over final estimate, due to natural sloughing outside slope stakes because of improper staking, 21,608 cu. yds. solid rock at $2.10 per cu. yd.	$45,376.80
2. Excess cost of construction due to changing from a borrow job to an excess cut job, 104,-135 cu. yds. at 60¢ per cu. yd.	62,481.00
3. Hand sorted rock surfacing, under written instruction of engineer, 23,014 cu. yds. at $2.50 per cu. yd.	5,785.00
Total	$113,642.80

Section C

1. Embankment, extra cost of excavation due to changing from a borrow job to an excess cut job, 140,925 cu. yds. at 68½¢ per cu. yd.	$96,533.62
2. Embankment, raising of grade by order of engineer, 9,987 c. yds. at 68½¢ per cu. yd.	6,841.09
3. Excavation, cost of raising of grade by order of engineer, 9,987 cu. yds. at 68½¢ per cu. yd.	6,841.09
4. Excavation, solid rock, 112,784 cu. yds. in excess of solid rock excavation required by Drummond line, at $1.65 less 68½¢ per cu. yd. allowed	108,837.43

5. Hand pick rock surfacing, under order of engineer, 13,602 cu. yds. at $2.50 per cu. yd. less $4,760.70 allowed on the same as backfill	29,244.30
6. Experimenting in slopes on engineer's order (quantities not available) reasonable cost	60,000.00
7. Extra excavation outside of cross section stakes caused by improper staking, 49,801 cu. yds. at 68½¢ per cu. yd.	34,113.60
Total	$342,411.13

IN UNITED STATES DISTRICT COURT

DEMURRER TO AMENDED PETITION—Filed August 26, 1925

I

Comes now the defendant The State Highway Commission of Wyoming and demurs to the second amended petition of the plaintiff filed herein and to both causes of action [fol. 75] therein alleged on the ground and for the reason that said second amended petition shows on its face that both causes of action therein alleged are actions against the State of Wyoming by the plaintiff, which is a non-resident of the State of Wyoming and which is a citizen and resident of the State of Utah, and that therefore this court has no jurisdiction of the subject or subjects of the action alleged in said second amended petition, and because the court has no jurisdiction to entertain this action against the State of Wyoming.

II

Comes now said defendant the State Highway Commission of Wyoming and demurs to the first cause of action alleged and set forth in plaintiff's second amended petition on the ground and for the reason that said first cause of action does not state facts sufficient to constitute a cause of action.

David J. Howell, Attorney General of Wyoming, C. L. Rigdon, Ray E. Lee, Special Assistant Attorney General of Wyoming, Attorneys for Defendants.

In United States District Court

Order Overruling Demurrer to Amended Petition—Filed Oct. 16, 1925

The motion of the defendant to strike certain portions of the second cause of action of the second amended petition herein having been heretofore argued and submitted, and the court being fully advised in the premises, said motion hereby is denied, to which ruling of the court the defendant objects and excepts.

The special demurrer of the defendant to the second amended petition herein having been heretofore argued and submitted, and the court being fully advised in the premises, it is ordered that said demurrer be and the same hereby is overruled, to which order and ruling of the court the defendant objects and excepts.

The demurrer of the defendant to the first cause of action of plaintiff's second amended petition herein having been heretofore argued and submitted, and the court fully advised in the premises, it is ordered that said demurrer be [fol. 76] and the same hereby is overruled, to which order and ruling of the court the defendant objects and excepts.

It is further ordered that said defendant have 30 days from and after this date in which to plead to said petition and plaintiff 15 days after service of copy of answer upon it to reply.

Dated this 16th day of October, A. D. 1925.

T. Blake Kennedy, Judge.

In United States District Court

Answer—Filed November 14, 1925

Comes now the above named defendant, The State Highway Commission of Wyoming, and for its answer to the first cause of action, as alleged and set forth in the second amended petition of plaintiff filed herein.

1. Admits that the matter and amount in controversy in this action, exclusive of interest and costs, exceeds the sum and value of Three Thousand Dollars.

2. Admits that prior to June 1st, 1922, one Goyne Drummond, acting for and in behalf of this defendant, made a preliminary survey of a certain proposed road and public highway along the course of the Wind River in Wind River Canyon in Fremont and Hot Springs Counties, Wyoming, but defendant denies that the said survey of said proposed road so made by the said Goyne Drummond, or that any plans, cross-section drawings or notes for the construction of a road through said Wind River Ca-yon, based upon said Drummond survey were ever approved or adopted by this defendant.

3. Admits that on or about the month of May, 1922, this defendant gave public notice for proposals to construct a road and highway through said Wind River Canyon, but denies that said notice for proposals stated that said road was to be constructed according to the plans of the Drummond survey, and denies that said road was to be so constructed.

4. Admits that plaintiff on or about June 1, 1922, made its written proposal in writing to construct said proposed road referred to in said published notice, and that said proposal was accepted by this defendant.

[fol. 77] 5. Denies that on or about the 3rd day of June, 1922, plaintiff made and entered into a written contract with said State Highway Commission but alleges that on or about that date, plaintiff made and entered into a contract with the State of Wyoming, by which it was agreed by and between the parties thereto that the plaintiff should construct such portions of said Wind River Canyon Road as were covered by said contract, in compliance with the specifications attached to said contract, but denies that the plans under which said road was to be constructed, were the so-called Drummond plans, and alleges the fact to be that it was understood and agreed by and between plaintiff and said State of Wyoming prior to the proposal of plaintiff and prior to the execution of said agreement, that said road should be constructed in accordance with a certain revised survey theretofore begun and then being made by the State Highway Engineer; that it was understood and agreed by and between the plaintiff and said State of Wyoming, that the road as located in the so-called Drummond plans as to

Section D would be constructed in accordance with the so-called Drummond plans, but that said road as to Sections B and C thereof would be constructed in accordance with said revised survey and plans then being made. Defendant further alleges that the differences in location of the road as shown in the Drummond plans and the location of the road as provided in said new revised survey, were fully explained to plaintiff and that plaintiff was fully advised in all particulars of the differences in location between the two surveys and that no detailed plans for the construction of said proposed road were yet available at the time of making said proposal and bid and at the time of the execution and signing of said alleged contract, and plaintiff agreed at the time of making said proposals and at the time of the execution and delivery of said alleged contract to construct said road as to Sections B and C thereof according to the plans of the revised survey, which was then being made.

6. Defendant admits that said contract provided for the payment of unit prices for the work to be done thereunder in accordance with the prices named in the proposals of the plaintiff, and that said prices were as alleged and set forth in the sixth paragraph of plaintiff's first cause of action.

7. Defendant admits that on or about the 12th day of December, 1922, the plaintiff and defendant entered into a supplemental agreement, and that a true copy of said supple-[fol. 78] mental agreement is annexed to plaintiff's petition and marked "Exhibit B." Defendant denies that said supplemental agreement was for the purpose of effecting any changes as originally shown on the so-called Drummond plans, but on the contrary defendant alleges that all extra excavation as called for the projected changes in the so-called Drummond survey was included in the estimates in the proposals submitted by the plaintiff before the execution of the original contract of June 1st, 1922, with the State of Wyoming, and that this fact was well known to the plaintiff and its agents prior to the execution of said agreement and also prior to the execution of said supplemental agreement. And in this connection, defendant alleges that at the time of the execution of said supplemental agreement, the plaintiff was fully informed that the said road was to be

constructed and was then being constructed according to the revised survey that had been made and completed prior thereto, and that the extra excavation and tunnelling called for and agreed to be performed by the plaintiff under said supplemental agreement was extra excavation and tunnelling as called for by said new survey and the plans made in accordance therewith.

8. Defendant admits that during the year 1922, the defendant caused a revised survey to be made by Corwine and Olson, engineers in the employ of defendant, and in this connection defendant alleges the facts to be that said survey was in great part completed on or before the first day of June, 1922, and before any construction work was done or performed by plaintiff; that no work was ever done by the plaintiff on the line of the Drummond survey in said Sections B and C, or either of them.

9. Defendant denies that the plans and specifications for the Corwine-Olson survey as given to the plaintiff did not show on their face that they represented a substantial departure from the original survey, but on the contrary, this defendant alleges that said new plans and specifications plainly showed on the face thereof, that said new plans were entirely different and called for an entirely different road to be constructed from that as shown on the Drummond survey; and that plaintiff long prior to the time that these plans were handed to it, knew that said road was to be constructed and was then being constructed on an entirely different line from the Drummond survey, and upon said revised, or so-called Corwine-Olson survey.

[fol. 79] 10. Defendant denies that the so-called change in plans made the operation of excavating and building the said highway more difficult or more expensive, or that it changed the nature of the material to be handled, or that it changed the engineering features, or that plaintiff in building said road according to said change of plans, was required to go to far greater expense, or any greater expense, than was contemplated when said alleged contracts were executed, and defendant further alleges that if said work was more expensive than contemplated by plaintiff, yet, with full knowledge of all facts, plaintiff agreed to make said excavation at the unit prices stated in its pro-

posals and cannot now be heard to complain in regard thereto.

11. Defendant denies that the plaintiff performed any other, extra, or different work from that agreed upon by it to be done or performed; denies that by reason of the matters alleged in plaintiff's petition, or that by reason of any default, negligence, deceit, or other act or acts on the part of this defendant, plaintiff has been damaged in the sum of $456,053.93, or in any other sum or sums whatsoever.

12. Defendant specifically denies each and every allegation in plaintiff's said first cause of action contained, which is not hereinbefore specifically admitted or denied, with the same force and effect as if each and every of said allegations were hereinbefore specifically denied.

II

And further answering the first cause of action as alleged and set forth in the second amended petition of plaintiff filed herein, defendant says:

That the State of Wyoming on the 1st day of June, 1922, entered into a written contract with the plaintiff for the construction of a portion of the Wind River Canyon Road State Highway, in the counties of Fremont and Hot Springs, Wyoming, and that a true copy of said contract is attached to the second amended petition of plaintiff herein;

That on or about the 12th day of December, 1922, plaintiff entered into a supplemental contract modifying the terms of said original contract, and that a true copy of said supplemental contract is attached to plaintiff's said second amended petition.

That at the date of said original contract, to-wit, on the 1st day of June, 1922, a resurvey of said proposed road was being made, but that said resurvey had not at said time been [fol. 80] completed, and an estimate of the quantities of excavation and tunnel work required by said resurvey had not at that time been made; that said resurvey was completed on or about the 15th day of July, 1922, and an estimate of the additional quantities of excavation and tunnel work made; that the final plans and estimates of said resurvey necessitated additional excavation over and above

the amount estimated at the time of the execution of said original contract herein mentioned, and required the construction of additional tunnels, and that it was thereupon agreed by and between said State of Wyoming and said plaintiff that said highway should be constructed in accordance with said resurvey, and that said supplemental contract hereinabove referred to was made and executed for the purpose of carrying into effect said agreement.

III

And for its answer to the second cause of action, as alleged and set forth in the second amended petition of the plaintiff filed herein:

1. Defendant admits that the matter and amount in controversy in this action, exclusive of interest and costs, exceeds the sum and value of Three Thousand Dollars.

2. Admits that prior to June 1st, 1922, one Goyne Drummond, acting for and in behalf of this defendant, made a preliminary survey of a cer-ain proposed road and public highway along the course of the Wind River Canyon in Fremont and Hot Springs Counties, Wyoming, but defendant denies that the said survey of said proposed road so made by the said Goyne Drummond, or that any plans, cross-section drawings or notes for the construction of a road through said Wind River Canyon, based upon said Drummond survey were ever approved or adopted by this defendant.

3. Admits that on or about the month of May, 1922, this defendant gave public notice for proposals to construct a road and highway through said Wind River Canyon, but denies that said notice for proposals stated that said road was to be constructed according to the plans of the Drummond survey, and denies that said road was to be so constructed.

4. Admits that plaintiff on or about June 1, 1922, made its written proposal in writing to construct said proposed road referred to in said published notice, and that said proposal was accepted by this defendant.

5. Denies that on or about the 3rd day of June, 1922, plaintiff made and entered into a written contract with said

[fol. 81] State Highway Commission but alleges that on or about that date, plaintiff made and entered into a contract with the State of Wyoming, by which it was agreed by and between the parties thereto that the plaintiff should construct such portions of said Wind River Canyon Road as were covered by said contract, in compliance with the specifications attached to said contract, but denies that the plans under which said road was to be constructed, were the so-called Drummond plans, and alleges the fact to be that it was understood and agreed by and between plaintiff and said State of Wyoming prior to the proposal of plaintiff and prior to the execution of said agreement, that said road should be constructed in accordance with a certain revised survey theretofore begun and then being made by the State Highway Engineer; that it was understood and agreed by and between the plaintiff and said State of Wyoming, that the road as located in the so-called Drummond plans as to Section D would be constructed in accordance with the so-called Drummond plans, but that said road as to Sections B and C thereof would be constructed in accordance with said revised survey and plans then being made. Defendant further alleges that the differences in location of the road as shown in the Drummond plans and the location of the road as provided in said revised survey, were fully explained to plaintiff and that plaintiff was fully advised in all particulars of the differences in location between the two surveys and that no detailed plans for the construction of said proposed road were yet available at the time of making said proposal and bid and at the time of the execution and signing of said alleged contract, and plaintiff agreed at the time of making said proposals and at the time of the execution and delivery of said alleged contract to construct said road as to Sections B and C thereof according to the plans of the revised survey, which was then being made.

6. Defendant admits that said contract provided for the payment of unit prices for the work to be done thereunder in accordance with the prices named in the proposals of the plaintiff, and that said prices were as alleged and set forth in the sixth paragraph of plaintiff's second cause of action.

7. Defendant admits that on about the 12th day of December, 1922, the plaintiff and defendant entered into a supplemental agreement, and that a true copy of said supplemental agreement is annexed to plaintiff's petition and marked "Exhibit B." Defendant denies that said supple-
[fol. 82] mental agreement was for the purpose of effecting any changes as originally shown on the so-called Drummond plans, but on the contrary defendant alleges that all extra excavation as called for by the projected changes in the so-called Drummond survey was included in the estimates in the proposals submitted by the plaintiff before the execution of the original contract of June 1st, 1922, with the State of Wyoming, and that this fact was well known to the plaintiff and its agents prior to the execution of said agreement and also prior to the execution of said supplemental agreement. And in this connection, defendant alleges that at the time of the execution of said supplemental agreement, the plaintiff was fully informed that the said road was to be constructed and was then being constructed according to the revised survey that had been made and completed prior thereto, and that the extra excavation and tunnelling called for and agreed to be performed by the plaintiff under said supplemental agreement was extra excavation and tunnelling as called for by said new survey and the plans made in accordance therewith.

8. Defendant admits that during the year 1922, the defendant caused a revised survey to be made by Corwine and Olson, engineers, in the employ of the defendant, and in this connection defendant alleges the facts to be that said survey was in great part completed on or before the first day of June 1922, and before any construction work was done or performed by plaintiff; that no work was ever done by the plaintiff on the line of the Drummond survey in said Sections B and C, or either of them.

9. Defendant denies that the plans and specifications for the Corwine-Olson survey as given to the plaintiff did not show on their face that they represented a substantial departure from the original survey, but on the contrary, this defendant alleges that said new plans and specifications plainly showed on the face thereof, that said new plans were entirely different and called for an entirely different road

to be constructed from that as shown on the Drummond survey; and that plaintiff long prior to the time that these plans were handed to it, knew that said road was to be constructed and was then being constructed on an entirely different line from the Drummond survey, and upon said revised, or so-called Corwine-Olson survey.

10. Defendant denies that the so-called change in plans made the operation of excavating and building the said highway more difficult or more expensive, or that it changed [fol. 83] the nature of the material to be handled, or that it changed the engineering features, or that plaintiff in building said road according to said change of plans, was required to go to far greater expense, or any greater expense, than was contemplated when said alleged contracts were executed, and defendant further alleges that if said work was more expensive than contemplated by plaintiff, yet, with full knowledge of all the facts, plaintiff agreed to make said excavation at the unit prices stated in the proposals and cannot now be heard to complain in regard hereto.

11. Defendant specifically denies, each and every allegation in plaintiff's second cause of action contained, which is not hereinbefore specifically admitted or denied, with the same force and effect as if each and every of said allegations were hereinbefore specifically denied.

IV

And for a further answer to plaintiff's said second amended petition filed herein, and to each cause of action in said petition contained, this defendant alleges that prior to the making of its said proposal and bid and prior to the making of any agreement or agreements for the construction of said proposed road, plaintiff had actual knowledge that said proposed road would not be built according to the so-called Drummond survey, and had actual knowledge that it would be built according to the revised survey that was then being made; that during all the times that plaintiff was engaged in the work of building and constructing said road, plaintiff had actual knowledge that said road was not being constructed or built according to the Drummond

survey, but that it was to be constructed and was being constructed according to the revised survey; and that plaintiff had actual knowledge of the kind and character of materials that would be encountered and were then being encountered in the construction and building of said road; and that at no time while the work of constructing said road was being done and performed by the plaintiff, and at no time prior to the completion of the building of said road, did the plaintiff make any protest to this defendant in regard to the work which it was required to do, or any protest that said road was not being built according to the terms of said contract, or any protest that said road was being built on a different line from the line on which plaintiff had agreed to build it, or any protest that the excavations and fills as made by the the plaintiff in the building and construction of said road, were in any manner different from [fol. 84] the excavations and fills which the plaintiff had agreed to make; that plaintiff performed all the work and labor required by it to be done and performed in the work of building said road without making any protest whatever in regard to the nature and character of said work; that plaintiff filed with the defendant its claim for payment for work which it had done and performed in the construction of said road on the basis of the unit prices mentioned in its proposal and provided for in said contracts, and that plaintiff during all the time that it was engaged in the construction of said road accepted payment from the State of Wyoming for such work so done and performed by it on the basis of such unit prices.

Defendant further states that by reason of plaintiff's having done and performed all of said work and labor so required by the defendant to be done and performed in the building of said road, and by reason of its having completed the building of said road without protest and without calling the defendant's attention to any of the matters now set forth as a basis for its claim for damages in its petition herein, and by reason of its having filed with this defendant its claim for payment for the work done and performed on the basis of the unit prices mentioned in its proposal and provided for in its said contracts, and by having accepted payment from the State of Wyoming for such work and

labor on the basis of such unit prices, plaintiff is now estopped from asserting or claiming that there was any fraud, deceit, misrepresentations or implied warranties of any kind on the part of this defendant, or its agents, prior to or during the time that said road was being built, or that the plaintiff was in any way misled or injured by any act or acts of this defendant or its agents, and that by reason of the facts aforesaid plaintiff is also estopped from claiming or recovering any compensation for the construction of said road in addition to, or other than, the compensation provided for in said contract with the State of Wyoming and said supplemental agreement.

V

And for a further defense to plaintiff's said second amended petition filed herein, and each cause of action in said amended petition contained, this defendant alleges that the so-called contract as alleged and set forth in plaintiff's petition was and is a contract made and entered into by and between the plaintiff and the State of Wyoming as parties thereto; that the State of Wyoming and not this defendant is the principal named in said contract and that said [fol. 85] State of Wyoming is the real party in interested in this action; that at the time said contract was entered into this defendant was acting merely as the agent for the State of Wyoming in making and entering into said contract; and that the plaintiff well knew that this defendant was then acting and during all the times mentioned in plaintiff's petition acted as such agent and in no other capacity; that the said State of Wyoming is a sovereign and independent commonwealth, and under the provisions of the Constitution of the United States of America, said State of Wyoming cannot be sued by the citizens of any other State in this Court or any other court without its consent; that said State of Wyoming has not given its consent to the bringing of this action or of any action against it in this Court.

VI

And for a further defense to said second amended petition of plaintiff herein, and to each cause of action in said petition contained, this defendant alleges that at all times

mentioned in plaintiff's petition said defendant was, and now is, merely an agency of the State of Wyoming, and that any suit against this defendant is in truth and in fact a suit against the State of Wyoming; that said State of Wyoming is a sover-ign and independent commonwealth and under the provisions of the Constitution of the United States of America cannot be sued by the citizens of any other State in this Court or any other court without its consent; that said State of Wyoming has not given its consent to the bringing of this action or any other action against it in this Court, and that there is no provision in the Constitution or Statutes of the State of Wyoming authorizing or permitting the bringing of an action of this nature against this defendant in this Court or any other court.

VII

And for a further answer to plaintiff's second amended petition filed herein, and to each cause of action therein contained, this defendant alleges:

That on or about the month of May, 1922, said defendant published a notice calling for bids and proposals to construct a highway through a portion of what is known as the Wind River Canyon in Fremont and Hot Springs Counties, Wyoming;

That said notice called for the submission of bids or proposals in writing on or before June 1, 1922;

[fol. 86] That on June 1, 1922, said plaintiff, through its officer, agent and representative, submitted a bid or proposal for the construction of a road through said Wind River Canyon;

That said bid or proposal was not based upon the notice published by said defendant and calling for bids or proposals for the construction of said road, or upon the information contained in said notice, but said bid was based upon certain oral representations and information given to the officer, agent and representative of said plaintiff, who presented said bid or proposal to said defendant for and on behalf of said plaintiff, which was the only bid or proposal submitted to said defendant by said plaintiff or on behalf of said plaintiff;

That said oral representations and information given to the officer, agent and representative of said plaintiff on the day he submitted said bid or proposal, but prior thereto, consisted of a statement of facts and explanation of the conditions upon which said road would be built, which was entirely different from the information contained in said public notice as published calling for the submission of bids or proposals for the construction of said road, and by said oral representations and statements of facts plaintiff was informed that the road which would be built was not the road described in said call for bids or proposal for construction thereof;

That the cost and value of the work to be performed and services to be rendered and materials furnished in the construction of said road was greatly in excess of the sum of Two Thousand Dollars;

That defendant acting as agent of the State of Wyoming let the alleged contract set forth in plaintiff's second amended petition and thereto attached as Exhibit A, which is dated June 1, 1922, to said plaintiff upon its bid or proposal based upon the oral representations and statement of facts instead of upon a bid or proposal submitted by said plaintiff and based upon the public notice calling for such bid or proposal and the information contained in such notice;

That by reason of the facts aforesaid the said alleged contract as set forth in plaintiff's second amended petition is illegal and void because it was made and entered into contrary to and in violation of the provisions and requirements of Section 3027, Wyoming Compiled Statutes, 1920;

That on or about December 12, 1922, plaintiff and defendant signed and delivered the alleged supplemental agreement, a copy of which is attached to, marked Exhibit [fol. 87] B, and made a part of plaintiff's second amended petition;

That said supplemental agreement was made and entered into for the purpose of employing plaintiff to do and perform certain work and furnish certain materials in the construction of the public highway which plaintiff was at the time constructing for the State of Wyoming through the Wind River Canyon in Fremont and Hot Springs Counties, Wyoming;

That the value of the work and labor performed, services rendered and materials furnished under thhe terms and conditions of said supplemeutal agreement was, and is, greatly in excess of Two Thousand Dollars and the cost of the improvements to be made pursuant to said supplemental contract or agreement was, and is, greatly in excess of Two Thousand Dollars;

That said alleged supplemental agreement was made without the giving of any public notice of the submission of any bids or proposals as required by Section 3027, Wyoming Compiled Statutes, 1920, and the said supplemental agreement is therefore illegal and void and contrary to and in conflict with the provisions and requirements of said Section 3027.

VIII

And — further answer to plaintiff's second amended petition filed herein, and to each cause of action in said petition contained, and as a complete bar to said action, this defendant alleges that at no time prior to the time of the filing of this action in this court, did the plaintiff present to or file with this defendant, or with the State Highway Superintendent of the State of Wyoming, any itemized statement or voucher or any statement or voucher whatsoever of its alleged claim against the State of Wyoming, or against this defendant, covering the items of damages as claimed and set forth in plaintiff's said first cause of action, or the amounts claimed in plaintiff's second cause of action, and that said plaintiff did not at any time present to said State Highway Superintendent for his approval any itemized statement of its said claim or any statement or voucher whatsoever covering said claim; and that at no time prior to the filing of this action in this court did the plaintiff present to or file with the State Auditor of the State of Wyoming, any itemized statement in writing for audit and allowance covering the items of damages as claimed and set forth in its said first cause of action, or the [fol. 88] amounts claimed in its said second cause of action, as required by the Constitution and Statutes of the said State of Wyoming.

Wherefore, having fully answered the petition of plaintiff, defendant prays that said petition be dismissed, and that it may have and recover its costs in this action expended.

David J. Howell, Attorney General for the State of Wyoming. C. L. Rigdon, M. A. Kline, Ray E. Lee, Special Assistants to the Attorney General.

Duly sworn to by David J. Howell. Jurat omitted in printing.

Receipt of a copy of the above answer is acknowledged this 14th day of November, A. D. 1925.

W. L. Walls, Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

REPLY—Filed January 14, 1926

Comes now the plaintiff, Utah Construction Company, and for its reply to defendant's answer herein says:

1. Plaintiff denies that the contract of June 3, 1922, was between plaintiff and the State of Wyoming, but states [fol. 89] that the same was between plaintiff and the State Highway Commission of Wyoming as alleged in plaintiff's second amended petition and not otherwise. Plaintiff denies that it was agreed between the parties to said contract that the plans under which said road was to be constructed were other than is set out in said second amended petition of plaintiff, and denies that it was agreed between the parties to said contract that the said road should be constructed in accordance with a certain revised survey then being made by the State Highway Engineer, or according to any other survey than the said Drummond survey. Plaintiff admits that it was agreed between the parties to said contract that the road as located in the said Drummond plans should be constructed as to Section "D" in accordance therewith; but denies that the said road as to Section "B" and "C" was to be constructed according to any plans

except the said Drummond plans. Plaintiff denies that it was fully, or otherwise, explained to plaintiff and/or that plaintiff was advised in all or any particulars of the differences in location between the said two surveys and/or was advised that no detailed plans for the construction of said proposed road were available at the time of making said proposal and bid and/or at the time of execution of said contract. And plaintiff denies that it was agreed at the time of the making of said proposals or at the time of the execution and/or delivery of said contract, or at all, that plaintiff was to construct said road as to Sections "B" and "C" thereof according to plans of the said revised survey which were then being made, or according to any other survey than that represented by the Drummond plans.

2. Plaintiff denies that all or any extra excavation called for by projected changes in the Drummond survey was included in the estimates of quantities contained in the proposals submitted by plaintiff before the execution of the said contract of June 1, 1922, and denies that the same was known to plaintiff prior to the execution of said agreement of June 1, 1922, or prior to the execution of the said supplemental agreement. Plaintiff denies that at the time of the execution of said supplemental agreement plaintiff was informed in any manner that the said road was to be constructed and/or was then being constructed according to the said revised survey, and plaintiff denies on its information and belief that the so-called revised survey had been completed prior to the said supplemental agreement. And in this connection plaintiff states that the so-called revised [fol. 90] survey mentioned in said answer was not in fact a revised survey but a complete and new survey of the said highway. Plaintiff denies that it was informed or knew at the time of the making of said supplemental agreement that the extra excavation or tunneling referred to therein was called for by said new survey and/or the plans made in accordance therewith.

3. Plaintiff denies that the great part, or any [substantial] proportion, of the said Corwine & Olson survey was completed on or before June 1, 1922, or was completed before any construction work was done by plaintiff; but in

this connection plaintiff states upon its information and belief that at the time when the said construction work was commenced by plaintiff a considerable portion of the survey upon the ground and the actual staking thereof had been done by Corwine and Olson.

4. Plaintiff denies that there were any new specifications as alleged in paragraph 9 of the answer or any specifications other than those attached to the written contract executed by the parties on or about June 1, 1922, and plaintiff denies that the plans of the Corwine & Olsen survey plainly showed on their face or otherwise that they were entirely different and called for an entirely different road to be constructed from that shown on the Drummond survey, and plaintiff denies that at any time prior to the time these plains were handed to it, and/or for a considerable time after the same were handed to plaintiff, that it knew that said road was to be constructed and was being constructed on an entirely different line from the Drummond survey and upon said Corwine & Olsen survey. And in this connection plaintiff states that not until the work was substantially completed did it learn that there had been an entirely new survey and change of plans by the defendant.

5. Plaintiff denies that the contract of June 1, 1922, was entered into between plaintiff and the State of Wyoming or otherwise than as alleged in plaintiff's second amended petition. Plaintiff denies that the said resurvey of said proposed road was completed on or about July 15, 1922, but in this connection plaintiff states upon its information and belief that the said resurvey was not finally completed until on or about the spring of 1923. Plaintiff denies that it was agreed at any time between the plaintiff and defendant that the said highway should be constructed in accordance [fol. 91] with said resurvey and denies that the said supplemental contract was executed for the purpose of carrying into effect any such agreement.

Plaintiff further denies that the plans of said Corwine and Olson survey necessitated any large additional quantities of excavation over that provided in the Drummond survey.

6. Replying to defendant's answer to the second cause of action this plaintiff incorporates as its reply thereto the denials hereinbefore given.

7. Replying to the entire answer, plaintiff denies that it had full or any knowledge that the work done by it in constructing said highway was according to a new survey or according to any plans *or according to any plans* except the original Drummond plans with the projected changes therein referred to with the addition of certain tunnel excavations and other changes of a minor nature referred to in the said supplemental agreement.

8. Plaintiff denies that prior to the making of its said proposal, bid and its contract of June 1, 1922, or at any time thereafter up to the substantial completion of the road, plaintiff had actual or any knowledge that said proposed road would not be built according to the so-called Drummond survey, or had actual or any knowledge that it would be built according to any revised or any survey which was then being made or was thereafter to be made. Plaintiff admits that it made no protests over the change in the survey and plans, except as alleged in the second amended petition, except that as soon as plaintiff discovered that said change in survey and plans had been made as alleged in said amended petition, which was after the substantial completion of the road, it did protest to defendant with respect to the same and with respect to the additional work required. Plaintiff states that while it received compensation from the State Highway Commission for the work which was done according to the unit prices which had been bid, it received such compensation without knowledge that it had constructed said highway along the line of an entirely new survey and/or had constructed the same at such excessive and extra cost and expense, as is alleged in said second amended petition. And in this connection plaintiff states that not until the work was actually done by it did it fully learn of the great and complete change which had been made in the line of the said highway and in the staking for the same, as is alleged in said second amended petition. And in this connection plaintiff denies that it is estopped [fol. 92] from now asserting its claim as alleged in said second amended petition against the defendant for the

reason that plaintiff was not advised or notified by defendant, and plaintiff did not know that the said road as constructed by it had been staked along an entirely different route and according to an entirely different plan and scheme than that contained in the so-called Drummond plans. In this connection plaintiff denies that it was not misled by the acts of the defendant; but states that the acts of the defendant in staking the road, for plaintiff's guidance, according to an entirely new route and survey and according to an entirely different plan than the road which plainitff had contracted to build, did deceive plaintiff and that plaintiff was deceived and misled thereby and induced to build the said road without knowledge that it was performing such large, additional and excessive service.

9. Referring to the further defense of plaintiff and in reply thereto and to the entire answer, plaintiff denies that the said contract referred to in its second amended petition was made between plaintiff and any other body than the defendant, and denies that the State of Wyoming is a party to said contract or the real party in interest in this action. Plaintiff admits that in making said contract the defendant was acting as an agent of the said state in the sense that the defendant was authorized to contract under the provisions of the statute of the State of Wyoming creating the State Highway Commission of Wyoming; but plaintiff denies that it knew at the time of the making of said contract of June 1, 1922, or at any other time, that the defendant was acting in any other capacity than as the State Highway Commission, created under the aforesaid statute of the State of Wyoming.

10. Plaintiff denies that this suit is in truth and/or was in fact a suit against the State of Wyoming, and denies that the said State of Wyoming has not given its consent to the bringing of this action, but alleges that such consent has been given.

11. Plaintiff admits that on or about the month of May, 1922, defendant published a notice calling for bids and proposals to construct the said highway through Wind River

Canyon, Wyoming, and that the plaintiff submitted its bid for proposal, as stated in its second amended petition, but denies that said bid and/or proposal was not based upon the said published notice and was not based upon the in- [fol. 93] formation contained in said notice, and denies that said bid was based upon any oral representations and/or information given to any officer or representative of plaintiff. Plaintiff denies that there was any oral representation or information given to plaintiff or any representative of plaintiff on the day plaintiff submitted said bid, or at any time, consisting of a statement or statement of fact and/or explanation of conditions upon which said road should be built which was entirely different from the information contained in said public notice, or substantially different therefrom, and denies that by any oral representation and/or statement of fact plaintiff was informed that the road which would be built was not the road described in said call for bids or proposal for construction thereof. Plaintiff denies that the defendant let the said contract attached to said second amended petition as Exhibit "A" to plaintiff upon any bid or proposal by plaintiff based upon any oral representation and/or statement of facts. Plaintiff denies that the said contract attached to its second amended petition as Exhibit "A" was irregular and/or void, and entered into contrary to or in violation of the provisions of Section 3227 Wyoming Compiled Statutes of 1920.

12. Plaintiff states that while it did not, prior to the commencement of this action, present any itemized statement or voucher of its said claim as set forth in said second amended petition to the said State Highway Superintendent or the defendant, plaintiff did, prior to the filing of this action, make its claim to the said Commission for additional compensation above that allowed in the final estimate of the State Highway Engineer referred to in plaintiff's second amended petition, and that plaintiff was thereupon informed by the defendant that no additional amount would be allowed than that allowed in the said final estimate of the said State Highway Engineer and that any claim it might make thereto would be rejected.

13. In further reply, plaintiff states that prior to and at the time that plaintiff made its said written proposal to the defendant for the construction of said Wind River Canyon road, and at the time of the making of the said contract referred to in the second amended petition as Exhibit "A," there was on file with the said Commission detail plans for the construction of said highway together with cross-section notes of the survey thereof and cross-sections, and that [fol. 94] said proposal for the construction of said highway referred to said plans on file with the Commission and the contract entered into referred to the same and to the said cross-sections, and plaintiff was furnished by the defendant with what purported to be a copy of said plans based upon the said Drummond survey. That by reason of such fact plaintiff was led to believe and did believe that the said plans and cross-sections and field notes were the approved plans, cross-sections and field notes of the road to be built, and the survey of the same, and entered into the said contract under said belief and performed the construction work thereon under said belief, and that the defendant having in such manner represented said plans to be as alleged is now estopped from denying that said survey, plans, notes and cross-sections were the approved plans of the defendant existing at the time of the making of said contract. That at the time of the making of said contract there were on file with the defendant no other plans or notes or cross-sections of the survey.

And this plaintiff denies generally and specifically each and every allegation of new matter in the defendant's answer contained not herein specifically admitted.

Wherefore, plaintiff having replied to defendant's answer, prays for the relief as demanded in its said second amended petition.

Benjamin S. Crow, Boston Building, Salt Lake City, Utah, W. L. Walls, Hynds Building, Cheyenne, Wyoming, Attorneys for Plaintiff.

Duly sworn to by Wm. L. Walls. Jurat omitted in printing.

[fol. 95] IN UNITED STATES DISTRICT COURT

DEMURRER TO REPLY—Filed November 6, 1926

Comes now the defendant the State High Commission of Wyoming and demurs to the reply filed herein by the plaintiff on the ground and for the reason that said reply and the record herein show upon their face that this court is without jurisdiction of the subject or subjects of the action alleged in plaintiff's pleadings, and because this court has no jurisdiction of this action.

II

Comes now said defendant the State Highway Commission of Wyoming and demurs to the reply of said plaintiff filed in this action upon the ground and for the reason that same is insufficient in law upon its face.

III

Comes now said defendant the State Highway Commission of Wyoming and hereby renews and reasserts its demurrers to the second amended petition of the plaintiff herein, upon the grounds and for the reasons therein stated.

David J. Howell, Attorney General of Wyoming, M. A. Kline, Ray E. Lee, Special Assistant Attorney General of Wyoming, Attorneys for Defendants.

IN UNITED STATES DISTRICT COURT

ORDER SUSTAINING DEMURRER AND DISMISSING CAUSE—December 4, 1926

This case having heretofore come on to be heard upon a demurrer to the reply, as well as a general demurrer to the petition herein, which demurrers challenge the jurisdiction of the Court, and having been argued by B. S. Crow, [fol. 96] Esquire, and W. L. Walls, Esquire, attorneys for plaintiff, and Marion A. Kline, Esquire, Ray E. Lee, Esquire, and John Dillon, Esquire, attorneys for defend-

ant, and having been taken under advisement by the Court, and the Court having considered the same, and being now fully advised in the premises, it is ordered by the Court that said demurrers be, and they are hereby, sustained, and this case be, and the same is hereby, dismissed, at the cost of the plaintiff.

Wnerefore, it is considered, ordered and adjudged by the Court that the defendant go hence hereof, without day, and have and recover of and from the plaintiff its costs by it in this behalf laid out and expended, to be taxed, and have execution therefor.

Dated December 4, 1926.

IN UNITED STATES DISTRICT COURT

PETITION FOR WRIT OF ERROR—Filed January 20, 1927

To the Honorable T. Blake Kennedy, Judge of the District Court aforesaid:

Now comes Utah Construction Company, a corporation of the State of Utah, by its attorneys and respectfully shows that on the 4th day of December, A. D. 1926, the Court sustained defendant's demurrers respectively to plaintiff's reply and plaintiff's petition in the above cause, and thereupon made and entered a final judgment in favor of the said defendants and against your petitioner, who was plaintiff in said cause, dismissing the said cause and adjudging that the above named defendants go hence hereof without day, and do recover their costs from the plaintiff.

Your petitioner, feeling itself aggrieved by said judgment and the said order sustaining said demurrers, herewith petitions the court for an order allowing it to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Eighth Circuit, under the laws of the United States made and provided.

Wherefore, the premises considered, your petitioner prays that a writ of error do issue that an appeal in this behalf to the United States Circuit Court of Appeals aforesaid, sitting at St. Louis, Missouri, in said circuit, for correction of the errors complained of and herewith assigned,

be allowed, and that an order be made fixing the amount of security to be given by the plaintiff in error, conditioned as [fol. 97] the law directs, and upon giving such bond as may be required, that all further proceedings may be suspended until the determination of such writ of error by the Circuit Court of Appeals.

John W. Lacey, Herbert Lacey, W. L. Walls, Benjamin S. Crow, Story & Crow, Attorneys for Petitioner in Error.

Copy of the foregoing petition received this — day of January, A. D. 1927.

William O. Wilson, M. A. Kline, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed January 20, 1927

Now comes, Utah Construction Company, a corporation, plaintiff, and plaintiff in error in the above numbered and entitled cause, and in connection with its petition for a writ of error in this cause, assigns the following errors which plaintiff in error avers occurred on the trial thereof, and in the action and decision of the court with respect to the issues of law therein, and upon which it relies to reverse the judgment entered herein, as appears of record:

1. The court erred in sustaining the said defendant's demurrer to plaintiff's reply filed in this cause.

2. The court erred in sustaining said defendant's demurrer to plaintiff's second amended petition filed in this cause.

3. The court erred in making and entering its judgment of dismissal and for costs against this plaintiff.

4. The court in sustaining said demurrers, erred in holding that this court had no jurisdiction of this action, and is without jurisdiction of the subject or subjects of the action; because the said second amended petition and said reply show that this court has jurisdiction of the cause in that it is a suit at common law between citizens of different states

in which the matter in controversy exclusive of interest *nad* [fol. 98] costs exceeds the sum and value of three thousand dollars, and is not a suit against the State of Wyoming.

5. The court erred in sustaining Defendant's demurrer to the first cause of action of plaintiff's second amended petition on the ground that the same does not state facts sufficient to constitute a cause of action.

6. If it shall be held that the court was without jurisdiction, and the demurrer on such ground was rightfully sustained, then the court erred in dismissing the cause on its merits, and in not placing its dismissal specially on the ground that the court had no jurisdiction, and not dismissing said cause without prejudice.

Wherefore, plaintiff in error prays that the judgment of said court be reversed.

John W. Lacey, Herbert Lacey, William L. Walls, Benjamin S. Crow, Story & Crow, Attorneys for Plaintiff in Error.

Copy of the foregoing assignments of error received this — day of January, A. D. 1927.

William O .Wilson, M. A. Kline, Attorneys for Defendant.

Bond on writ of error for $500.00 approved and filed January 20, 1927, omitted in printing.

[fol. 99] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT—Filed January 20, 1927

To the Clerk of the above-entitled Court:

You are requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the [fol. 100] Eighth Circuit, pursuant to a writ of error granted in the above entitled cause, and to include in such transcript of record, the following, and none other papers:

1. Plaintiff's Second Amended Petition, including exhibits attached thereto, filed.
2. Demurrer of defendant to the Second Amended Petition, filed.
3. Order made and entered overruling Defendant's said demurrer.
4. Defendant's Answer to the Second Amended Petition, filed.
5. Plaintiff's reply to Answer, filed.
6. Demurrer of Defendant to Second Amended Petition and Reply, filed.
7. Order sustaining Demurrer and Judgment of Dismissal made December 4, 1926.
8. Petition for Writ of Error.
9. Assignments of Error.
10. Supersedeas Bond.
11. Original Writ of Error.
12. Original Citation.
13. This Præcipe.

John W. Lacy, Herbert Lacey, William L. Walls, Benjamin S. Crow, Story & Crow, Attorneys for Plaintiff in Error.

Services of the foregoing Præcipe by receipt of copy, admitted this — day of January, A. D. 1927.

M. A. Kline, Attorney for Defendant, The State Highway Commission of Wyoming.

[fol. 101] IN UNITED STATES DISTRICT COURT

OPINION ON OVERRULING OF DEMURRER TO AMENDED PETITION—Filed October 16, 1925

KENNEDY, Judge:

This is an action at law brought to recover damages alleged to have grown out of a contract between plaintiff and defendant. It is before the court at the present time upon (1) a motion to strike certain portions of the second cause of action, (2) a demurrer challenging the jurisdiction of the court, and (3) a general demurrer to the first cause of

action. It will be necessary to examine briefly plaintiff's second amended petition.

The petition sets forth that the plaintiff is a corporation and a citizen and resident of the State of Utah; that the defendant, State Highway Commission of Wyoming has been designated as such by an act of the State legislature of Wyoming and consists of the five commissioners named in the title; that it and they are each residents and citizens of the State of Wyoming and the said Commission has power to sue and be sued under the provisions of the statute creating it; that the matter in controversy exceeds the value of three thousand dollars, exclusive of interest and costs; that the Commission is engaged in the construction of highways in the State, acting th-ough its Superintendent and Highway Engineers; that a plan was perfected for the construction of a highway through what is known as the Wind River Canyon of a length exceeding thirteen miles, for which bids were asked and in which proposals the substantial route, grades and materials to be moved were designated; that the plaintiff entered a bid upon the proposed construction which was accepted, a contract between the plaintiff and the Commission entered into, and thereupon the plaintiff proceeded to perform the work which it carried to completion and an acceptance by the Commission; that after the plaintiff had started work changes were proposed which necessitated the execution of a supplementary contract calling for additional work, which was to be paid for upon a basis adopted in the original contract. The plaintiff then alleges in substance, that in making the changes in plans which the supplemental contract purported to cover, the defendant through its engineers made a substantial departure from the original survey, removed or destroyed the stakes of the original survey and substituted new ones without distinctive marks and that the plans so substituted did not advise plaintiff on their face that they [fol. 102] represented a substantial departure from the lines of the original survey. The petition then alleges the manner in which the original survey was changed by the revised plans and in particular the additional work which this change placed upon the plaintiff, setting forth in detail the reason why the cost to the plaintiff could not be absorbed under the supplemental contract, on account of extra slough-

ing, hauling, borrowing, wasting, hand-sorted rock surfacing, increased excavation, and extra work of a similar nature. For this extra work the plaintiff claims damages in excess of $486,000. This in substance represents plaintiff's first cause of action.

The second cause of action is a suit to recover the balance withheld by the defendant upon the original and supplementary contract price in a sum in excess of $88,000, which it is alleged defendant has refused to pay plaintiff unless it will release all claims for extra compensation. Into this second cause of action nearly all of the allegations of the first cause of action are introduced by adoption.

In the motion to strike, defendant seeks to have eliminated from the second cause of action those paragraphs which relate to the basis of claim for extra compensation. While not necessary to a statement of the second cause of action, counsel for plaintiff contends that they are properly there as correctly setting forth its reasons for failing to accept the balance due as computed by the Highway Department under the original and supplemental contracts. Inasmuch as it is clear from the allegations of the second cause of action that through it the plaintiff is seeking only to recover the balance due as calculated by the Highway Commission, it seems to the court that no ill effects can be suffered by the defendant in allowing these paragraphs to remain as a portion of the second cause of action simply for the purpose stated, no damages being asked in it for extra compensation. The motion to strike will therefore be overruled.

In a special demurrer, the defendant challenges the jurisdiction of the court, the point being, that the suit is one against the State of Wyoming in which the plaintiff is a non-resident, thereby bringing the cause into controvention of the Eleventh Amendment to the Constitution of the United States, which reads:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

[fol. 103] In the opinion of the court, the special demurrer must be overruled. In the first place, the Highway Commission is an agency of the state authorized to carry on certain designated functions. While the act creating it (Wyo. Comp. Stats. 1920, sec. 3025) does not specifically state that the Commission shall be a corporation, it does state that it shall consist of five state highway commissioners and specified the manner in which they shall be selected. The petition alleges that the commissioners comprising it are all residents of the State of Wyoming. In the case of Thomas vs. Board of Trustees, 195 U. S. 207, in which the Trustees of the Ohio State University were sued in the Federal court and the question of jurisdiction was raised by reason of the fact that the act of the legislature did not constitute the board as a corporation, it was held that had the petition shown that the individual members comprising that board were each residents and citizens of the State of Ohio, the board would be entitled to be sued by their collective name.

Again, the act creating the Commission specifically provides that it may sue and be sued in its name as the State Highway Commission upon any contract executed by it. In the case of Smith vs. Reeves, 178 U. S. 436, Mr. Justice Harlan in delivering the opinion of the court at page 444-441, says:

"But it is contended that by the section of the Political Code of California above quoted the State has consented that its Treasurer may be sued in respect of the matters specified in that section, and it is argued that this case comes within the decision in Beers vs. Arkansas, 20 How. 527, 529, in which it was said to be an established principle of jurisprudence in all civilized nations that while the soverign cannot be sued in its own courts or in any other without its consent and permission, a State 'may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals or by another State.' So in Clark vs. Barnard, 108 U. S. 436, 447: 'The immunity from suit belonging to a State, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in a suit,

otherwise well brought in, which a State had sufficient interest to entitle it become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction; while, of course, those courts are always open to it as a suitor in controveries between it and citizens of other States.'

[fol. 104] "It is quite true the State has consented that its Treasurer may be sued by any party who insists that taxes have been illegally exacted from him under assessments made by the State Board of Equalization. But we think that it has not consented to be sued except in one of its own courts."

In the case of Reagan vs. Farmers' Loan & Trust Co., 154 U. S. 362, at page 391, is found the following language:

"Given a case where a suit can be maintained in the courts of the State to protect property rights, a citizen of another State may invoke the jurisdiction of the Federal Courts. Cowles vs. Mercer County, 7 Wall. 118; Lincoln County vs. Luning, 133 U. S. 529; Chicot County vs. Sherwood, 148 U. S. 529.

"We need not, however, rest on the general powers of a Federal Court in this respect, for in the act before us express authority is given for a suit against the commission to accomplish that which was the specific object of the present suit."

It will be noted that the statute creating and empowering the defendant Commission, uses the broad term "in any court." The point was raised where the language of the statute only used the term "District Court," and Judge Dietrich of the Federal Idaho court, in the case of Interstate Const. Co. vs. Regents of the University of Idaho, 199 Fed., 509, at page 512, broadly construes such a statute, cites numerous authorities from the United States Supreme Court sustaining the view which the court has taken upon this and the General principle involved. A portion of his language is:

"While the phrase 'district court,' as here used, doubtless refers to the state district court, it is not thought that the Supreme Court intended to limit the rights of contrac-

tors to the state tribunals. The state district court was referred to, because it is the court of original general jurisdiction in the state. The holding of the Supreme Court seems to be that the defendant, a body corporate, may sue and be sued as any other corporation organized under the laws of the state. In that view, the sovereign has consented that, in so far as it is represented by the 'Regents of the University of Idaho,' it may be sued in this court. Beers vs. Arkansas, 20 How. 527, 529, 15 L. Ed. 991; Clark vs. Barnard, 108 U. S. 436, 447, 2 Sup. Ct. 878, 27 Ed. 780; Railway Co. vs. Whitton, 13 Wall. 270, 286, 20 L. Ed. 571; Reagan vs. Farmers' Loan & Trust Co., 154 U. S. 362, 391, [fol. 105] 14 Sup. Ct. 1047, 38 L. Ed. 1014; Smyth vs. Ames, 169 U. S. 466, 516, 18 Sup. Ct. 418, 42 L. Ed. 819; Smith vs. Reeves, 178 U. S. 436, 440, 20 Sup. Ct. 919, 44 L. Ed. 1140."

The defendant further contends, however, under its general demurrer to plaintiff's first cause of action, that that pleading does not state a cause of action, maintaining among other things, that it appears from the face of the petition that any extra work performed was performed under the supplementary contract which is amply and sufficiently covered by the second cause of action; that the plaintiffi having performed the work without protest it cannot recover as for breach of contract; that the plaintiff cannot recover because of false representations, since none are specifically or sufficiently alleged; that the cause of action does not state a suit upon breach of implied warranty because none is pleaded; that the action is one on quantum meruit which cannot be maintained; and that no presentation of the claim had been made to the State Auditor which is a pre-requisite to the collection of moneys which come from the State.

Counsel for defendant have presented many authorities sustaining their various contentions and the point in controversy are not free from doubt. If the suit as set up in the first cause of action shows upon its face that it comes within the original and supplemental contracts, of course it cannot be maintained. Likewise, if it is a suit on quantum meruit it is probable that it cannot be maintained. On the other hand, if it be construed as a suit on the contract, it is possibly maintainable. A number of cases are cited

by counsel for defendant in support of its contention that the suit here is on the contract and that the alleged representations made by the defendant's officials which misled the plaintiff, entitles plaintiff to maintain its suit. In the case of Christie vs. United States, 237 U. S. 234, the holding of the court concerning the point involved is expressed in the syllabus in the following language:

"Where there is a deceptive representation in the specifications as to the material to be excavated which actually misleads the bidder who obtains the contract, and it is admitted by the Government that time did not permit borings to be made by the contractor to verify the representations, the latter is entitled to an allowance for the actual amount expended over what would have been the cost had the boring sheets been accurate, notwithstanding there was no sinister purpose whatever.

[fol. 106] "The legal aspects of such a case are not affected by the fact that the omissions amounting to misrepresentations did not have a sinister purpose."

In United States vs. Gibbons, 109 U. S. 200, a case in which a contractor was allowed damages against the Government growing out of a contract to repair walls, a portion of which had been destroyed and excluding portions which had been uninjured by fire, it was held that inasmuch as certain portions had been left standing in the clearing away process, it was the representation of the Government officials that the standing portions were uninjured and did not come within the contract and that as a consequence when the contractor was required to rebuild this portion of the standing walls because they were subsequently adjudged unsafe, that the contractor was entitled to recover compensation covering the extra work. The point was decided upon the theory that it was the duty of the government agents to point out to the contractor the work deemed to be sufficiently uninjured to remain.

In the case of United States vs. Atlantic Dredging Co., 253 U. S. 1, a controversy arose between the parties over the matter of extra compensation claimed by the company on account of the fact that the Government had concealed from the contractor the results of certain borings which had brought information to the Government officials that

the material to be removed was much heavier than that shown by the plans and specifications; and although there was no guaranty as to what the material to be removed actually was and the contractor was required to make his independent examination, it was held that the representations of the Government officials were deceptive in that test borings were made by the Government and information secured which was not imparted to the bidder and that in consequence the contractor should be entitled to recover. This cause holds that such a claim is not one in tort but in contract and seems to place it upon the basis of a warranty arising out of the contract. The decision further holds that having elected to continue the work, the contractor did not forfeit his right to extra compensation. In this respect the language of the court at page 11, is as follows:

"The Government, however, contends that, at best, the alternative was presented to the company, when it discovered the character of the materials, to either quit work and sue for damages, or continue the work; and that having elected the latter, it cannot now resort to the other. In for-
[fol. 107] tification of this contention it is said that 'even if the Government had made a misrepresentation as to the borings, that misrepresentation would necessarily have been as to the character of the materials to be dredged, and claimant knew all there was to know about this from the 'very beginning.' '

"This assumption and the extent of it and the conclusion from it, are not justified. It is true the company discovered that the material it encountered was different in character from that represented, but the company did not know of the concealment of the actual test of the borings, and the fact that the company attempted to struggle on agaginst the difficult conditions with its inefficient plant should not be charged against it. In other words, it should not now be held to have been put to the suggested election. It did not know at that time of the manner in which the 'test borings' had been made. Upon learning that they had been made by the probe method, it then elected to go no further with the work, that is, upon discovering that the belief expressed was not justified and was in fact a deception. And it was not the less so because its impulse was not sinister or fraudulent.

"The Government makes the point, however, that the implication of the case is that bad methods were used, and insists that the implication makes the action one for a tort, and not tenable against the United States. We cannot assent. There is no intimation of bad faith against the officers of the Government and the Court of Claims regarded the representation of the character of the material as the nature of a warranty; besides, its judgment is in no way punitive. It is simply compensatory of the cost of the work, of which the Government got the benefit."

The case of United States vs. Spearin, 248 U. S. 132, arose over the construction of a dry-dock for the Government according to plans and specifications which involved the reconstruction of a sewer which intersected the site. The contractor was required to reconstruct the sewer, which he did, but owing to conditions of drainage which were known to the Government but not known to the contractor during flood season, the sewer as constructed was not adequate and damage resulted to the dry-dock excavation. The contractor refused to proceed unless the Government would pay extra compensation in making good the damage or assuming responsibility for future damage. This the Government refused to do, the contractor declined to proceed, the Government annulled the contract and the contractor brought suit, the court holding that he should be entitled to [fol. 108] recovery what would have been his profit had the extraordinary situation not have arisen. Speaking of the situation thus presented, the court on page 137, uses the following language:

"But the insertion of the articles describing the character, dimensions and location of the sewer imported a warranty that, if the specifications were complied with, the sewer would be adequate. This implied warranty is not overcome by the general clauses requiring the contractor, to examine the site, to check up the plans, and to assume responsibility for the work until completion and acceptance. The obligation to examine the site did not impose upon him the duty of making a diligent inquiry into the history of the locality with a view to determining, at his peril, whether the sewer specifically prescribed by the Government would prove adequate. The duty to check plans did not impose

the obligation to pass upon their adequacy to accomplish the purpose in view. And the provision concerning contractor's responsibility cannot be construed as abridging rights arising under specific provisions of the contract.

"Neither Par. 3744 of the Revised Statutes, which provides that contracts of the Navy Department shall be reduced to writing, nor the parol evidence rule, precludes reliance upon a warranty implied by law. See Kellogg Bridge Co. vs. Hamilton, 110 U. S. 108. The breach of warranty, followed by the Government's repudiation of all responsibility for the past and for making working conditions safe in the future, justified Spearin in refusing to resume the work. He was not obliged to restore the sewer and to proceed, at his peril, with the construction of the dry-dock. When the Government refused to assume the responsibility, he might have terminated the contract himself, Anvil Mining Co. vs. Humble, 153 U. S. 540, d 551-552; but he did not. When the Government annulled the contract without justification, it became liable for all damages resulting from its breach."

But it is earnestly urged by counsel for defendant that these cases do not apply to the case at bar, for the reason that they are not analogous, which it must be admitted they are not as to facts, and yet they seem to come near to establishing the principle of law which may govern the situation here presented.

The gist of plaintiff's first cause of action is, that the course of the highway to be constructed was substantially changed by the plans of subsequent engineers in such a way that they were not within the scope of the original or sup- [fol. 109] plemental contracts; that the changes so made were not discoverable from the amended plans and specifications given to the contractor so that he could not know that the changes were general and in effect making a new road, instead of a minor character contemplated by the supplemental contract; and that he was thereby forced to do additional work. It may be that proofs of these allegations will not be sufficient to substantiate the allegations, but on their face the allegations seem to present the theory on the part of the plaintiff, of representations made by the

defendant's officials which were false, at least in so far as they purported to give only such minor changes as were contemplated by the supplemental contract; but if the demurrer should be sustained, the plaintiff would be foreclosed from even an opportunity to present proof of its allegations of the circumstances surrounding the changes which were unknown and undiscoverable to plaintiff. This theory brings the petition within the class of cases where a warranty under the contract is involved. In [with] view also, the suit is on the contract and not on a quantum meruit. Likewise, the situation is not affected by the fact that there was no fraudulent intention or motive involved in the minds of the defendant's officials (United States vs. Atlantic Dredging Co., supra), and in consequence no specific allegations of fraudulent intent need be alleged. The rule laid down in the cases cited also disposes of the contention in so far as the point can be raised by the demurrer at least, that the work being completed without protest does not bar the contractor from asking for extra compensation. No specific allegation of a breach of warranty need necessarily be alleged in these specific terms, I take it, if the statement of ultimate facts in the petition fairly bring it within the scope of such a theory.

As to the contention that the claim should have been previously presented and rejected by the State Auditor, we think it is a sufficient answer to say, that when the State consents that it or its agencies may be sued, the court is only concerned in the matter of permitting the opportunity to establish a claim by judgment and if so established, the court is likewise not concerned in the manner or method of its collection. Particularly should presentation to the Auditor be disregarded here when the law provides that such claims as are approved by the Highway Department can only be allowed by the Auditor and the Highway Department in this instance has refused to approve plaintiff's claim for extra compensation.

[fol. 110] While some of the points raised by the general demurrer are close, we feel that upon the theory advanced by the plaintiff, it should have an opportunity to try out its claim upon the merits, and for the reasons stated, both the special and general demurrers will be overruled, reserving

to all rulings exceptions to the defendant and giving it twenty days within which to plead if it may be advised.

IN UNITED STATES DISTRICT COURT

OPINION ON SUSTAINING OF DEMURRER TO REPLY, ETC.—
Filed December 4, 1926

KENNEDY, Judge:

This is an action in which the plaintiff, a citizen of the State of Utah, seeks to recover of the defendant, damages growing out of a construction contract involving a state highway. The petition was originally met by a demurrer, which after hearing was overruled and an answer filed followed by a reply thereto. The matter is again before the court upon a demurrer filed to the reply as well as a general demurrer to the petition, which last demurrer, as did the one formerly overruled, challenges the jurisdiction of this court, but upon a different ground. Whatever may be the legal formality by which the question is presented, whenever the lack of jurisdiction of the court is suggested, it becomes the court's duty to investigate the matter and if jurisdiction is wanting to dismiss the cause, or if upon removal remand the same. Section 37, U. S. Judicial Code.

Under the demurrer which was overruled, the point suggested was that the court was without jurisdiction because the suit was against the State of Wyoming and therefore in contravention of the Eleventh Amendment to the Constitution of the United States forbidding the judicial power of the United States to extend to suits against the states by citizens of another state. In this respect the court ruled, in effect, that, inasmuch as the legislature creating the State Highway Commission of Wyoming had by an act authorized it to sue and be sued in any court, then whether or not the suit was aginst the Highway Commission as a distinct entity, or against the State itself was immaterial, because the State had by its affirmative act waived its immunity under the Eleventh Amendment and citing as authority Smith vs. Reeves, 178 U. S. 436; Clark vs. Barnhard, 108 U. S. 436. This court then entertained the view

[fol. 111] which has recently been expressed by the Eighth Circuit in the case of Hertz vs. Knudson, 6 Fed. (2d) 812, where at page 816 the court says:

"The Eleventh Amendment to the Constitution which provides that 'the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state,' is not here involved. By this amendment a privilege is granted for the benefit of the state, which applies specifically to suits prosecuted against the state. It has been uniformly held under this amendment that a state cannot be made a defendant in a federal court against its consent, but that the privilege may be waived if the state sees fit voluntarily to submit itself to the jurisdiction."

Upon the presentation of this demurrer, however, it is suggested that even though the state has waived its immunity, it still being insisted that the action is one against the state, that the United States District Court has no jurisdicion of the subject matter and jurisdiction cannot be conferred by consent of the parties or by consent of the state to be sued in the courts of the United States, the gist of the argument being, that the jurisdiction here is wanting because the suit is based upon an amount in controversy in excess of the statutory limitation and the diversity of the citizenship of the parties, and that the diversity of citizenship is destroyed because of judicial holdings that the state is not a citizen.

Two points therefore press for determination in the present controversy, first, it now becomes necessary to determine whether or not the action is in effect one against the state, and second, if so, whether or not this court has jurisdiction of the case.

In the determination of the first question, a brief analysis of the nature of the action and an examination of the law under which roads of the character in controversy are constructed would seem to throw some light upon the subject. The contract sued upon, entered into in June, 1922, was for the construction of a state highway in what is known

as the Big Horn Canyon in this state, and called for such construction according to plans and specifications made by the State Highway Engineer. There was also a supplemental contract calling for additional excavation upon the same basis of remuneration as the original contract. The [fol. 112] petition sets forth in substance, that after the first plans and specifications were presented they were subsequently changed by other engineers of the department in such a way that it made substantially a new route, which the plaintiff did not discover until near the completion of the contract, thereby causing the plaintiff to suffer additional and extraordinary expense in completing the project, which the plaintiff sues to recover. In a former hearing upon a general demurrer to the petition this court held that the action was in its nature one upon a contract and not an action upon quantum meruit, upon the strength of the following cases: Christie vs. United States, 237 U. S. 234; United States vs. Atlantic Dredging Co., 253 U. S. 1; United States vs. Gibbons, 109 U. S. 200; United States vs. Spearin, 248 U. S. 132. The contract itself by its caption recites that the agreement is between the State of Wyoming, acting th-ough the State Highway Commission and the plaintiff, is executed by the State Highway Commission through its superintendent, and provides that the work shall be done under the direct supervision of the Highway Commission, subject to inspection and approval by the Secretary of Agriculture under the Act of June 11, 1916, thereby showing that the construction involved was under what is known as the Federal Aid Act.

The law pertaining to the question is found in the Wyoming Constitution and statutes. In 1916 Wyoming adopted an amendment to her Constitution known as Section 9 of Article 16, which reads as follows:

"The provision of Section 6 of Article 16 of this constitution prohibiting the state from engaging in any work of internal improvement unless authorized by a two-thirds vote of the people shall not apply to or affect the construction or improvement of public roads and highways; but the legislature shall have power to provide for the construction and improvement of public lands and highways in whole or in part by the state, either directly or by ex-

tending aid to the counties; and notwithstanding such inhibition as to works of internal improvement, whenever grants of land or other property shall have been made to the state, especially dedicated by the grant to particular works of internal improvement, the state may carry on such particular works and shall devote thereto the avails of such grants, and may pledge or appropriate the revenues derived from such work in the aid of their completion."

[fol. 113] Under this constitutional provision, in 1919 the legislature adopted an act now known as Chapter 185 of the Wyoming Compiled Statutes of 1920, providing for the issuance of bonds for road building purposes and the same year passed an act authorizing the state to go into the road building business, such act being known as Chapter 186 of the same compiled statutes. The latter act by its terms provides, among other things, that a state highway department be created to consist of the State Highway Commission and a State Highway Superintendent; that the commission shall consist of five state highway commissioners who shall be appointed by the Governor by and with the consent of the Senate; that the commissioners shall qualify by taking the constitutional oath of office; that the commission shall maintain offices in the state capitol; that the commission shall have power to sue in the name of the "State Highway Commission of Wyoming," and may be sued in any court upon any contract executed by it; that the Attorney General shall be legal advisor of the commission; that the commission shall have an official seal; and that all records of its office certified under the hands of its secretary shall be received in any court; that the commission shall appoint a state highway superintendent who shall take the constitutional oath of office upon qualifying; that said superintendent shall have complete charge of laying out and establishing highways; that the commission shall have authority to acquire rights of way by condemnation proceedings; that the work to be performed upon highways, except where the same is in co-operation with the Secretary of Agriculture, shall be performed at the expense of the state; that the commission shall have power to co-operate with counties in the construction of highways; that there be created a fund to be known as the state highway fund, in which the

State Treasurer shall place all moneys received from any source for highway purposes, which shall be paid out only on vouchers approved by the State Highway Superintendent; that there is appropriated the sum of $300,000.00 made available for road building on and after March 1, 1920, and all balances remaining of the fund shall not revert to the general fund but be subject to subsequent expenditure; and that the overhead expense in connection with the administration shall not exceed fifteen per cent of the total amount expended each year.

Is the action upon a contract such as here outlined under the constitution and statutes referred to, one in effect against the State of Wyoming or one against a separate [fol. 114] entity created by the State, so as to take it out of the class of cases held to be against the State?

The Supreme Court of Wyoming in Hjorth Royalty Company vs. Trustees of the University, 30 Wyo., 309, it being a suit to quiet title to lands, held that the State was the real party in interest, that the suit in effect was one against the State and that in the absence of legislative consent to suit, it could not be maintained.

In a recent decision in the case of Fidelity and Deposit Company of Maryland vs. The Trustees of the University of Wyoming, No. 1658, (not yet reported) this court held that that case was in effect a suit against the state which could not be maintained for the reasons that the State, although designating them as a corporate body, had not given the Trustees of the University authority to sue or be sued, and further that the relief sought was simply to direct and compel the trustees under a construction contract, to carry out the functions delegated to them by statute and that the case therefore fell within a class which made it in effect a suit against the State, as distinguished from a class where state officials were presuming or threatening to perform acts in violation of constitutional rights, in which latter class the courts have held that such suits are not against the state, but against individuals who, although state officials, purport to do unlawful things. This distinction is clearly drawn in the cases there cited and particularly summarized in the case of Pennoyer vs. McConnaughy, 140 U. S., 1. Here a similar situation exists in that the cause of action is upon a contract which would place it in the first

class of cases there mentioned, (for if not upon the contract the action is not in our opinion well founded,) but with the difference between the two, that the legislature here has given its agency the power to sue and be sued, not, however, specifically designating it as a corporate body. Does this distinction relieve the suit of its character of being one against the state? In the early decisions of the Supreme Court it was held that the question of the suit being one against a state was to be determined by the fact as to whether or not the state was a party to the record, but this rule has long since been abrogated through a series of decisions culminating in the comparatively recent decision of Ex parte State of New York, 256 U. S. 490, where at page 500 the court says:

"As to what is to be deemed a suit against a State, the early suggestion that the inhibition might be confined to those in which the State was a party to the record (Osborn [fol. 115] vs. United States Bank, 9 Wheat. 738, 846, 850, 857) has long since been abandoned, and it is now established that the question is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding as it appears from the entire record. Louisiana vs. Junel, 107 U. S. 711, 719, 720, 723, 727-728; Hagood vs. Southern, 117 U. S. 52, 67, et seq.; In re Ayers, 123 U. S. 1, 10, et seq.; Smith vs. Reeves, 178 U. S. 436, 438-440; Murray vs. Wilson Distilling Co., 213 U. S. 151, 168-170; Lankford vs. Platte Iron Works Co., 235 U. S. 461, 469."

In Hopkins vs. College, 221 U. S. 636, at page 642, the court says:

"And, looking through form to substance, the Eleventh Amendment has been held to apply, not only where the State is actually named as a party defendant on the record, but where the proceeding though nominally against an officer, is really against the State, or is one to which it is an indispensable party. No suit, therefore, can be maintained against a public officer which seeks to compel him to exercise the State's power of taxation; or to pay out its money in his possession on the State's obligations; or to execute a contract, or to do any affirmative act which affects the State's political or property rights."

In the case of Poindexter vs. Greenhow, 114 U. S. 270, the court at page 287 uses the following language:

"It is also true, that the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record. The provision is to be substantially applied in furtherance of its intention, and not to be evaded by technical and trivial subleties."

In the light of this authority in analyzing the issue here, we find that the highway construction over which the controversy arises was initiated by a constitutional amendment which authorized the State of Wyoming to go into the road building business. The State thereupon proceeded to carry out this new function by creating an agency through which it might efficiently act. It provided for raising money by bonding itself and taxing its inhabitants for the purpose and providing that such money, as well as that received from other sources, should be accumulated in the hands of its State Treasurer; that its chief legal advisor should be the legal advisor of its agency in the premises; that such agency should maintain its office in the state capitol; that the state might enter into agreements with the [fol. 116] United States for the building of roads, under an Act of Congress, which type of road was here under construction; and directed the manner in which the funds so raised by it should be disbursed, as well as the other incidents which are incorporated heretofore in an analysis of the Wyoming statute.

It is difficult to conceive how any function could be more clearly regarded as an act of the state itself than is the building of state highways in Wyoming. It would therefore be equally clear that the state in the present instance was actually engaged in building the highway in controversy, were it not for the somewhat isolated factor that the state had given its agency for road building purposes the authority to sue and be sued. As to the effect of this provision, counsel argue that it is a definite act which severs the agency from the state itself and makes it a distinct entity. In support of this they cite some authority, largely by state courts, but two cases by the Supreme Court of the

United States, one being Hancock vs. Louisville Railroad Co., 145 U. S. 409, where by an act of the state legislature authorizing a portion of a county within a limited district to issue bonds for building a railroad, it was held that the act of the state thereby created a quasi corporation which was capable of suing and being sued in the courts. It is clear, however, that this was not an entity created by the state for the purpose of carrying into effect purely state functions but was rather an authority of the state to one of its designated areas to contribute to a commercial enterprise in which the state as such had no interest. In the case of Port of Seattle vs. W. W. R. Co., 255 U. S. 56, the Supreme Court held that the suit was not against the state, for the reason solely that the Port of Seattle had been constituted a municipal corporation by the state and that it as such was the real party in interest, even though the state itself had some interest in the controversy. We have found no cases, and none has been called to our attention, (except, perhaps, Bromwell Brush Co. vs. State Board, 279 Fed. 440, a District Court decision which seems out of harmony with the later Supreme Court decisions), where an agency of the state engaged solely in carrying out purely state functions, although given the power to sue and be sued, has been recognized by the Federal courts as an entity distinct from the state itself for jurisdiction purposes. As a matter of fact, the consent to suit provision itself suggests state agency, as a distinct entity, whether under special or general laws would naturally have the ordinary rights of that character running to corporations or quasi-corporations.

[fol. 117] We feel, therefore, although it may be a close question, that in the face of the contract, the constitution and the statutes, which reflect the real situation of the contract work being performed under state regulation and control by one of its designated agencies, for the benefit of the state and its citizens generally, and paid for very largely by the people of the state through bond issues and taxation, that a simple clause which permits a state agency to sue or be sued, would be too narrow a thread upon which to [hand] the court's determination, that the principal party in interest in this suit is not the state, and that a more reasonable construction of this suability provision of the

statute would be, that the state had consented that it might be sued through its agency, the State Highway Commission, thereby probably giving the State courts jurisdiction of the suit. This process of reasoning necessarily leads to the conclusion that the suit here is in effect one against the State of Wyoming, and now the second question heretofore suggested presents itself, as to whether or not being a suit against the State, this court has jurisdiction of it.

This angle of the question counsel for the defendants have not discussed, either in their oral argument or in their trial briefs, and were the matter before an appellate court, the point may well have been considered as abandoned. However, for the purposes of this decision it cannot be entirely ignored by the court.

As before stated, this action so far as the jurisdiction of this court is concerned, is based upon the necessary amount being in controversy and the diversity of citizenship of the parties, but as stated in Postal Telegraph Cable Co. vs. Alabama, 155 U. S. 482, at page 487:

"A State is not a citizen. And, under the Judiciary Acts of the United States, it is well settled that a suit between a State and a citizen or a corporation of another State is not between citizens of different states; and that the Circuit Court of the United States has no jurisdiction of it, unless it arises under the Constitution, laws or treaties of the United States."

This doctrine is again reasserted as a basis of the Supreme Court's decision in the case of Minnesota vs. Northern Securities, 194 U. S. 48, at page 63. By the force of these decisions the necessary element of diversity of citizenship is swept out of this case, because with a citizen of another state as the plaintiff and the state itself in effect as the defendant, the State of Wyoming is not a citizen. [fol. 118] Nor does the evident waiving of immunity by the State *nu*der the Eleventh Amendment and thereby consenting that it may be sued through its agency in the premises seem to relieve the situation. The many cases in the books involving the jurisdiction of the United States courts over cases in which a state has been a party, do not seem to be analogous in their facts with the case at bar, although

it may be admitted that freely running passages in some of the opinions might seem to hold that a state by waiving its immunity under the Eleventh Amendment could be sued in the Federal district courts. A cursory reading of the language in Smith vs. Reeves, 178 U. S. 436, and Clark vs. Barnard, 108 U. S. 436, might seem to indicate as much. This language probably refers to cases in which the Federal courts have jurisdiction of the subject matter. However, it is certain that jurisdiction cannot be sustained upon the ground of diversity of citizenship, which is the jurisdictional ground named in the petition, in the view which this court takes of the nature of this suit. If it were to be sustained therefore upon any other jurisdictional ground it must needs be by virtue of some clause found in the statute defining this court's jurisdiction, as of course this is not a court of general, but of limited jurisdiction, having only such jurisdiction as is specifically delegated to it by Congress. Section 24 of the Judicial Code purports to specify the jurisdiction of the United States District Courts. While this section is subdivided into 25 sub-sections, the provision of sub-section number one would seem to apply only to the character of a controversy which is here before the court. It is there provided that in suits involving more than $3,000.00, exclusive of interest and costs, the district court has jurisdiction under three separate and distinct situations, to-wit: Where such a suit "(a) arises under the Constitution or laws of the United States, or treaties made, under their authority, or (b) is between citizens of different states, or (c) is between citizens of a state and foreign states, citizens, or subjects." The situation here does not satisfy any of these requirements, considering the determination of the court that there is no diversity of citizenship in this case. If the cause involved a Federal question under clause (a) above, the Federal District Court might have jurisdiction where the state is a party. See Ames vs. Kansas, 111 U. S. 449, and Postal Telegraph Co. vs. Alabama, supra.

For the reasons stated, it must be held that the court has no jurisdiction of the case, and a final order and judgment may be entered dismissing it at the cost of the plaintiff, and reserving to plaintiff its proper exceptions.

[fol. 119] IN UNITED STATES DISTRICT COURT

ELECTION AS TO PRINTING OF TRANSCRIPT—Filed March 7, 1927

Comes now the above named plaintiff and appellant and hereby elects to have the printing of the transcript in the above entitled case done under the supervision and direction of the Clerk of the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

Dated this 7th day of Mar., A. D. 1927.

W. L. Walls, Attorney for Plaintiff.

Clerk's certificate to foregoing transcript omitted in printing.

[fols. 120 & 121] Appearances of counsel omitted in printing.

[fol. 122] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

ARGUMENT AND SUBMISSION—September 12, 1927

This cause having been called for hearing in its regular order, argument was commenced by Mr. Benjamin S. Crow for plaintiff in error, continued by Mr. Marion A. Kline for defendants in error and concluded by Mr. Benjamin S. Crow for plaintiff in error.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein, with leave to parties to file further briefs within five days.

[fol. 123] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, DECEMBER TERM, A. D. 1927

No. 7793

UTAH CONSTRUCTION COMPANY, a Corporation, Plaintiff in Error,

vs.

THE STATE HIGHWAY COMMISSION OF WYOMING, Defendant in Error

In Error to the District Court of the United States for the District of Wyoming

OPINION—Filed Dec. 21, 1927

Prior to 1916 the State of Wyoming could not engage in any work of internal improvement unless authorized by a two-thirds vote of the people. In that year the constitution was amended, the amendment reading:

"The provision of section 6 of article XVI of this constitution prohibiting the state from engaging in any work of internal improvement unless authorized by a two-thirds vote of the people shall not apply to or affect the construction or improvement of public roads and highways, but the legislature shall have power to provide for the construction and improvement of public roads and highways in whole or in part by the state, either directly or by extending aid to counties."

Pursuant to this constitutional amendment the legislature in 1919 passed an Act creating a State Highway Department, now embodied in Wyoming Compiled Statutes 1920 as sections 3025-3037. We summarize the Act.

Section 3025 creates a State Highway Department to consist of a State Highway Commission and a State Highway [fol. 124] Superintendent. The commission consists of five commissioners to be first appointed by the Governor, with the advice and consent of the senate, and after stated periods to be elected biennially. The commission shall maintain offices in the State Capital to be in charge of the State Highway Superintendent; it shall have the power to sue in the name of "The State Highway Commission of

Wyoming," and may be sued by such name in any court upon any contract executed by it. The Attorney General shall be the legal adviser of the commission and shall prosecute and defend all actions in which the commission shall be a party or be interested. The commission shall have a seal bearing the words, "State Highway Commission of Wyoming, Official Seal."

Section 3026. The salary of the State Highway Superintendent, whom the commission appoints, shall be fixed by the commission and under the supervision of the commissioners he shall have complete charge of laying out and establishing highways upon which any portion of the State Highway Fund is to be expended, except on those highways constructed, improved or maintained in cooperation with the Secretary of Agriculture of the United States, under section 8 of the Act of Congress approved July 11, 1916 (39 Stat. 335), or other Federal Acts authorizing the use of Federal funds in the building of roads. With the approval of the commission the superintendent shall purchase all materials, supplies and equipments and shall employ such engineers and other employes as may be necessary for the proper performance of the duties of the commission in the construction of the work undertaken by it.

Section 3027. All road and bridge construction work, any part of the cost of which is paid from the State Highway Fund, shall be performed in accordance with plans and specifications prepared by the State Highway Superintendent and approved by the commission, and shall be performed by or under contracts awarded by the commission, and the State Highway Superintendent shall have complete charge thereof, except on those highways constructed in cooperation with the Secretary of Agriculture under Acts of Congress. Improvements costing more than $2,000 shall be constructed upon contracts awarded to the lowest responsible bidder after public notice. Improvements costing less [fol. 125] than $2,000 may be constructed by the commission upon force account or upon contract awarded on public notice. The commission shall adopt general rules regulating the publication of notice to bidders and the awarding of contracts.

Section 3028. It is made the duty of the State Highway Commission from time to time to designate public highways to be known as State Highways, which may coincide, in whole or in part, with county roads theretofore legally established, and whenever such State Highways shall be defined and designated by resolution duly entered in the minute record of the said commission, the title and interest of the respective counties and so much of the road and right of way as shall be so designated shall pass to and vest in the State of Wyoming. Rights of way not acquired from counties may be acquired by purchase or gift or by condemnation proceedings brought by the commission.

Section 3029. Except as to work on highways performed in co-operation with the Secretary of Agriculture of the United States, the construction and maintenance of all State Highways, including bridges and culverts thereon, shall be performed at the expense of the State and by and under the supervision of the commission and State Highway Superintendent.

Section 3030. The commission may cooperate with counties in the construction of county roads, bridges and culverts. All such cooperative work shall be performed under the control and supervision of the commission and the State Highway Superintendent in accordance with plans and specifications prepared by the Superintendent, but shall not be commenced until the county shall have entered into agreement with the commission to pay not less than one-half of the total cost of such work to the State and the entire cost of maintaining said highway thereafter.

Section 3031. The State assents to the provisions of the Act of Congress approved July 11, 1916, and to amendatory Acts granting Federal aid to States in the construction and improvement of public roads, and the State Highway Commission is authorized to enter into all contracts and agreements with the United States for that purpose. The good faith of the State is pledged to provide its share of the funds for construction and maintenance. The com- [fol. 126] mission is authorized to cooperate with the Secretary of Agriculture for that purpose. Where the road to be improved is a State Highway the State's share of the expense shall be borne entirely by the State. If a county highway the county must pay into the State Highway Fund

its share of the estimated cost and bind itself to pay all subsequent maintenance.

Section 3032. It is made the duty of the State Highway Superintendent to compile all available information relative to public roads and bridges within the State and to prepare standard plans and specifications for the construction of roads, culverts and bridges. He may call upon the boards of county commissioners for assistance in gathering the necessary data.

Section 3033. The State Highway Superintendent shall make annual reports to the commission of the transactions of the department, and the commission shall make reports to the Governor biennially.

Section 3034. A State Highway Fund is created, to be in the custody and keeping of the State Treasurer. He shall place to its credit all amounts theretofore or thereafter received from the United States under said Act of Congress, all moneys derived from taxes levied for the purpose of or appropriated for said fund, all moneys received from the sale of State bonds for highway construction or improvement, all moneys received from counties under cooperative agreements provided for in the act, and all moneys from any source by donations or otherwise intended for highway improvement. All moneys so credited to said fund by the State Treasurer are made available without further appropriation, but no warrant shall be drawn thereon except on voucher approved by the State Highway Superintendent.

Section 3035. $300,000 is appropriated to the State Highway Fund out of moneys in the State Treasury not otherwise appropriated, and made available upon the passage of the Act, and an additional sum of $300,000 is made available on March 1, 1920, for road purposes out of public funds then in the State Treasury not otherwise appropriated.

The two remaining sections are not material.

[fol. 127] After this writ of error was sued out, but before the cause was submitted here, the State legislature amended

section 3025 so that the part of it providing for suits by and against the commission reads thus:

"The commission shall have the power to sue in the name of 'The State Highway Commission of Wyoming' and may be sued by such name in the courts of this state and in no other jurisdiction upon any contract executed by it."

In the spring of 1922 the commission decided to construct a State Highway known as the Wind River Canyon Road, which was a Federal Aid project. Bids were taken, and the bids of plaintiff in error for the construction of sections B, C and D were accepted. These sections cover 13.42 miles of the road extending from Boysen Dam to the bridge in Thermopolis. Plans and specifications were submitted to the bidders. On June 1, 1922, a contract with plaintiff in error was entered into pursuant to its bid. In that contract the State of Wyoming is named as party of the first part and Utah Construction Company, a Utah corporation, as party of the second part. The first paragraph of the contract is in these words:

"This agreement made and entered into this 1st day of June, 1922, between the State of Wyoming, acting through the State Highway Commission, and Utah Construction Company, a corporation, of Ogden, in the State of Utah, hereinafter called the Contractor."

The contractor agreed to do all work and furnish all labor, material, etc., necessary to construct in good workmanlike and substantial manner and to the satisfaction of the State Highway Engineer the portion of the Wind River Canyon Road State Highway from Boysen Dam to bridge south of Thermopolis under the direct supervision of the State Highway Commission, subject to inspection at all times and approval by the Secretary of Agriculture pursuant to the provisions of the Act of Congress, and in full compliance with the attached plans and specifications, which were made a part of the contract. "In consideration therefor the State of Wyoming shall pay and the Contractor shall receive and accept as its full compensation under the contract the prices stipulated in the proposal" of the contractor, which was the contractor's bid. The contractor [fol. 128] made separate bids in the form of proposals to

the State Highway Commission for the construction of each of the three sections, and in each the bid was expressed in unit prices for the different kinds of work to be done, that is, the bid for each section was made on the basis of so many cents per cubic yard for different kinds of excavation and fills, so much per cubic yard for dry rubble masonry, so much per lineal foot for culverts, etc. No gross amount was named as the bid on either section, and it was agreed that the amount of work of different kinds to be done on the different sections, as stated in the specifications, was only an estimate. Returning to the terms of the contract of June first, it provides a basis for liquidating damages, if any, that might be sustained by the State of Wyoming, and it was agreed that the contractor should make payment thereof to the State of Wyoming. Monthly payments based upon approximate estimate of the amount of work done during the preceding month, were to be computed by the engineer and made to the contractor, and within a reasonable time after the acceptance of the work the State Highway Engineer was required to certify to the commission a final estimate based upon the quantities measured by the engineer and computed according to the unit prices in the contractor's proposals, which were attached to the contract as a part thereof. This would show, as the contract recited, the total work done and the amount due the contractor therefor, after all previous payments and any other amounts retained under the provision of the contract were deducted. It provided that the State Highway Commission might require the contractor to show to its satisfaction that it had discharged all of its debts for labor, material used or amounts due sub-contractors on the work. All prior partial estimates and payments were subject to correction in the final estimate and payment. The advertisement, proposal, bond of the contractor, plans and specifications attached to the contract or referred to in it were declared to be a part of the contract. The concluding paragraph of the contract is in these words:

"In Witness Whereof, the State of Wyoming, acting through its State Highway Commission, party of the first part, has caused these presents to be executed by its Superintendent and the seal thereof to be hereunto affixed, on the day and year first above written; and the said party

of the second part, has caused these presents to be exe-
[fol. 129] cuted and has hereunto affixed his hand and seal the 3rd day of June, A. D. 1922.

State Highway Commission of Wyoming, by L. E. Laird, Superintendent. (Seal.) Attest: Z. E. Sevison, Secretary. The Utah Construction Company, by W. H. Wattis, President. (Seal.) Attest: Warren L. Wattis, Secretary."

Later a supplemental agreement was made. It was signed in the same way and by the same parties as was the agreement of June first. The first paragraph of the supplemental agreement reads thus:

"Supplementing the contract entered into the 1st day of June, 1922, between the State Highway Commission of Wyoming, and The Utah Construction Company for the construction of the Wind River Canyon road in Fremont and Hot Springs Counties, being Sections B, C and D of Federal Aid Project No. 118, the following facts and conditions are hereby mutually agreed to:"

This supplemental agreement was executed about December 12, 1922. It extended the time for completion of the work by the contractor. It recited:

"In the final location and staking out of Sections B and C, it was found desirable and advantageous to make certain changes in grades and alignments from those shown on the original plans, which changes had been anticipated by both parties, at the time of executing the contract, but the quantities involved were unknown at that time."

It substituted cement rubble masonry head walls in lieu of concrete head walls; it stated that tunnel excavation had been increased to approximately 882 lineal feet, the amount in the original contract being less than half that length; it stated that on account of increased quantities of excavation the contract could not be completed on April 1, 1923; the contractor agreed to an increased quantity of unclassi-
[fol. 130] fied excavation on Section B of approximately 30,000 cubic yards and to perform the same at the contract price called for in the original contract, to an increased

quantity of unclassified excavation on Section C of approximately 100,000 cubic yards and to perform the same at the unit price called for in the original contract, to construct the cement rubble masonry head walls at a unit price of $14 per cubic yard and to complete the increased amount of tunnel excavation at the contract unit price of $70 per lineal foot; and the State Highway Commission on its part agreed that the contractor might waste material from cuts and borrow material outside of the staked cross-sections for fills in order to permit the use of steam shovels for rough grading; and there is a proviso as to the basis of payment for work done in that way.

There is sharp controversy as to whether the State of Wyoming or the State Highway Commission was a party to the contract, and as bearing on that question we now note some of the clauses of the specifications, which are made a part of the contract. The specifications, in their definition of terms, say that "Contract" means "The agreement between the contractor and the State Highway Commission covering the work to be performed and including the plans and specifications." They provide that each bidder must accompany his bid by money deposit equal to two per centum of the amount of the proposal in the form of cash, a draft, or a certified check payable to the State Highway Commission of Wyoming, and in case of his failure to enter into the contract and furnish the required bond the bidder's deposit shall become a donation to the State Highway Fund. The specifications provide in one part that the State Highway Commission may enter upon the performance of the work if the contractor fails, and in another part that the State of Wyoming may enter for the purpose of doing the work necessary to complete the contract.

Plaintiff in error brought this suit, alleging in the first count of its complaint a breach of the contract by defendant and resulting damages to it in a very large amount, for which it asked judgment. The breach, as alleged, consisted in a change of the line of the road through two of the sections; that is, a new survey for those two sections, which moved the road to be constructed back from the [fol. 131] shore line of the river on to righer ground. Plaintiff was there at the time engaged in construction

work, but it thought the changes were only those referred to in the supplemental contract. The work was thus made more difficult and costly to plaintiff. The second cause of action alleged full performance by plaintiff, that the engineer and defendant found the total amount for the work to be $511,953.38, of which $88,773.81 has not been paid, and judgment is prayed for that amount. The commission demurred to the complaint, on the ground that the suit was against the State of Wyoming and for that reason the court was without jurisdiction; also on the ground that the first count did not state facts sufficient to constitute a cause of action. The demurrer was overruled and the commission answered. It denied the allegations charging it with a breach of the contract, and alleged that it was understood at the time plaintiff made its bid and the contract was entered into that the route of the road was to be changed through two sections, that a new survey was made for that purpose and the change made while plaintiff was engaged upon the work, that it had full knowledge of the change and agreed thereto. The answer alleged that with full knowledge of the changes that were made plaintiff proceeded with the work and was paid on estimates at the unit prices called for by the contract, and the plaintiff at no time prior to the completion of the building of the road made any objection or protest that it was being required to do work not called for by the contract. To this answer plaintiff replied. It admitted that it made no protest over the change in the survey until after the road was substaintially completed, but alleged that it did not discover the change before that time and that it received payments as the work progressed without knowledge that it had constructed the road along an entirely new survey. We have not attempted to give in full the allegations of the pleadings but only sufficient to disclose the nature of the controversy. After plaintiff's reply came in the defendant renewed its demurrer, which was sustained and the complaint dismissed. The assignments challenge that ruling as error.

Mr. Benjamin S. Crow (Mr. John W. Lacey, Mr. Herbert V. Lacey, and Mr. W. L. Walls were with him on the brief), for plaintiff in error.

[fol. 132] Mr. Marion A. Kline (Mr. William O. Wilson, Mr. James A. Greenwood and Mr. John Dillon were with him on the brief), for defendant in error.

Before Lewis, Circuit Judge, and Pollock and Scott, District Judges

LEWIS, Circuit Judge, after stating the facts as above, delivered the opinion of the Court:

The learned district judge in finally sustaining the demurrer expressed his reasons in a written opinion. Following the rule announced on the subject in ex parte State of New York, 256 U. S. 490, and other cases, the conclusion was reached that the suit was in reality against the State; and that being so, the jurisdiction alleged, diverse citizenship, did not exist—because the State is not a citizen. Postal Tele. Cable Co. v. Alabama, 155 U. S. 482; Minnesota v. Northern Securities, 194 U. S. 48; Hertz v. Knudson, 6 F. (2d) 812; and Chicago R. I. & P. Ry. Co. v. State of Nebraska, 251 Fed. 279. Furthermore, it was thought that even if the statute authorizing suits against the State Highway Commission should be taken as a waiver of the State's immunity granted by the Eleventh Amendment, still that would not confer jurisdiction where it appeared from the complaint the court was without jurisdiction. Obviously, both conclusions rest on the premise that the suit against the commission is a suit against the State.

Primarily the commission could not be sued at law unless it be a party to the contract. Barring equitable innovations, with which we are not now concerned, Anson on Contracts, 2nd Am. Ed., page 459, says:

"• • • the rule is best expressed in the words of Parke, B., in Beckham v. Drake, 9 M. & W. 95, 'those only can sue or be sued upon an indenture who are named or described in it as parties.' "

Looking only to the contract of June 1, 1922, it would be difficult to say that the commission was a party to it and liable to suit for its breach. Apparently it signed the contract in its own right and behalf, but the obligation to pay for the work was expressly imposed on the State, and the [fol. 133] State, not the commission, was named as a party

to it. But for the supplemental agreement we would be constrained to say the commission could not be sued. But we observe in the later agreement the parties here declared over their signatures that the agreement of June first was a contract between the State Highway Commission of Wyoming and the Utah Construction Company. That statement is rather borne out by excerpts from the specifications and is in harmony with the statute itself which authorizes the commission to make such contracts. The statute made it a legal entity for that purpose, imposed on it the duty of initiating the improvement, to supervise its construction and to make settlements with the contractor.

We are not impressed with the soundness of the contention that the suit is in reality one against the State. Plaintiff seeks no relief against it, nor interference with its property, rights or functions. The commission is the sole defendant, it has no property, no power of taxation, no means of discharging a judgment should one be recovered against it. In that event it will be entirely optional with the State as to what, if anything, it will do in the premises. It will not be legally bound. But if the court has jurisdiction the controversy between the parties to the contract will be finally adjudicated, and that seems to be the limit of our present inquiry. Port of Seattle v. Oregon & W. R. R., 255 U. S. 56, 71.

The complaint distinctly alleges that each member of the commission is a resident and citizen of the State of Wyoming. We think there can be no doubt the commission is suable as such and that the Federal court had jurisdiction because of diverse citizenship. Seemingly the identical inquiry was answered in Thomas v. Board of Trustees, 195 U. S. 207, 218: "* * * as the Board was entitled to sue and be sued by their collective name, and would be bound by any judgment rendered against it in that name, the jurisdiction of the Circuit Court would have sufficiently appeared, so far as the pleadings were concerned, without bringing the several persons constituting the Board before the court as defendants, provided the bill had contained the additional allegation that each individual Trustee was a citizen of Ohio." It hardly need be said that the members of the commission would not be personally liable, had they been made parties; because their acts were official, [fol. 134] and not of a personal character. Hodgson v. Dex-

ter, I Cranch 345, 363; Belknap v. Schild, 161 U. S. 10, 17; Astoria Marine Iron Works v. United States Shipping Board Emergency Fleet Corporation, 295 Fed. 415, 417.

The demurrer did not challenge the second cause of action on the ground that it did not state sufficient facts; and the trial court expressed no opinion in its written memorandum on that issue as to the first cause of action. We see no cause to doubt the sufficiency of the second count as a pleading, and, as said, it was not challenged; as to the first count we leave that for the present to the court below.

Reversed with directions to set aside the order dismissing the complaint.

IN UNITED STATES CIRCUIT COURT OF APPEALS

DISSENTING OPINION—Filed Dec. 21, 1927

SCOTT, District Judge, dissenting:

I regret that I am unable to concur with the majority of the Court in its opinion sustaining the jurisdiction of the District Court. I am constrained to the conclusion that the State Highway Commission of Wyoming is not a corporation. The act of the Wyoming legislature creating the Board does not purport to create a corporation, but in my opinion a mere Commission to which is committed the execution of particularly described duties. It is designed to hold no title to property. It can have no financial interests of any character, and neither it nor its members are in any true sense trustees. The State legislation respecting this body, as well as the Act of Congress known as The Federal Highway Act, seems to contemplate mutual transactions between the National Government and States. In my opinion the case was one essentially against the State of Wyoming. The case was an action at law to recover a money judgment for increased compensation for construction of the highway, and alleged to have been occasioned by a change of survey. It is conceded in the majority opinion that the State Highway Commission of Wyoming has nothing from which the judgment could be paid, and it is likewise conceded that the plaintiff can recover nothing from [fol. 135] the individual members of the Board. It is fur-

ther conceded that in the event of recovery "it will be entirely optional with the States as to what, if anything, it will do in the premises." It seems to me that such an adjudication would be a mere gesture.

The case of Port of Seattle v. Oregon & W. R. R., 255 U. S. 56, cited in the majority opinion, seems to me to be clearly distinguishable. In that case the Port of Seattle was expressly created as a Municipal Corporation, and was empowered to hold property and receive revenue in its own legal right. As the Supreme Court there said:

"The Port has thus an independent financial interest in this controversy; and although the State has also an interest, suit against the Port would not be prevented by the Eleventh Amendment."

I also think the case of Thomas v. Board of Trustees, 195 U. S. 207, also cited in the majority opinion, clearly distinguishable. In that case while it was held that the bill did not allege facts showing the incorporation of the Board, the bill did disclose that the Board was in reality a Board of trustees, "and to have the general supervision of all lands, buildings and other property belonging to said college, and of receiving by gifts, devise or bequest, moneys, lands and other properties for its benefit and for the benefit of those under its charge, etc." Had the necessary diversity of citizenship been alleged and the individual members of the Board been named as defendants as in the instant case, the opinion of the Supreme Court to my mind indicates that the Circuit Court would have had jurisdiction. Indeed, the answers of the Supreme Court were certified with liberty to the Circuit Court of Appeals to authorize an amendment of the bill alleging the necessary diversity of citizenship of the individual members. With the appropriate amendment, I have no doubt that in that case, as well as in the Port of Seattle case, the Court would have had jurisdiction to finally adjudicate the rights in question, and grant complete equitable or legal relief in accordance with the class of the respective cases.

I think the principle laid down in Ex Parte State of New York, No. 1, 256 U. S. 490, and Smith v. Reeves, 178 U. S. 436, is applicable to the case at bar, and that the action here was merely one against the State Highway Commis-

sion and its individual members as such. A brief interesting note will be found on the subject in 44 L. R. A. (N. S.) [fol. 136] at page 196. I quote from the note:

"In some of the cases the state agency or board is itself a corporation with general power to sue and be sued. In other cases the result in the main seems to depend upon the nature of the action or relief demanded. Thus, in the Lord case, infra, it was a question of obtaining money out of the state treasury." * * * "In Lord & P. Chemical Co. v. Board of Agriculture, 111 N. C. 135, 15 S. E. 1032, it was held that an action would not lie against the board of agriculture, its commissioner, and the state treasurer to recover taxes paid under protest to it, and turned over it seems to the state treasurer, as the board was a department of the government, and that the action was an action against the state."

There is another serious question going to the jurisdiction of a Federal Court. The legislature of the State of Wyoming in amending the original act provided:

"The commission shall have the power to sue in the name of 'The State Highway Commission of Wyoming' and may be sued by such name in the courts of this state and in no other jurisdiction upon any contract executed by it."

The case of Smith v. Reeves, supra, was one brought by an individual against Reeves as State Treasurer of California. Section 3669 of the Political Code of California provided in case of actions against the State Treasurer for the recovery of taxes illegally collected that "at the time the Treasurer demurs or answers, he may demand that the action be tried in the Superior Court of the county of Sacramento." It was contended in that case that by the section referred to the State had consented that its Treasurer might be sued in respect to the matters specified. Mr. Justice Harlan, in delivering the opinion of the Court, said:

"It is quite true the State has consented that its Treasurer may be sued by any party who insists that taxes have been illegally exacted from him under assessments made by the State Board of Equalization. But we think that it

has not consented to be sued except in one of its own courts. This is not expressly declared in the statute, but such, we think, is its meaning. The requirement that the aggrieved taxpayers shall give notice of his suit to the Comptroller, and the provision that the Treasurer may at the time he demurs or answers 'demand that the action be tried in the Superior Court of the County of Sacramento,' indicate [fol. 137] that the State contemplated proceedings to be instituted and carried to a conclusion only in its own judicial tribunals. If a Circuit Court of the United States can take cognizance of an action of this character, the right given to the Treasurer by the local statute to have the case tried in the Superior Court of Sacramento County would be of no value; for, as the jurisdiction and authority of a Circuit Court of the United States depends upon the Constitution and laws of the United States, it could not refuse to take cognizance of the case if rightfully commenced in it and to proceed to final decree, nor could it, merely in obedience to the laws of the State, transfer it to a state court upon the demand of the State Treasurer. A Federal court can neither take nor surrender jurisdiction except pursuant to the Constitution and laws of the United States.

"In Beers v. Arkansas, above cited, it was further said: 'As this permission (to be sued) is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it. Arkansas, by its constitution, so far waived the privilege of sovereignty as to authorize suits to be instituted against it in its own courts, and delegated to its General Assembly the power of directing in what courts, and in what manner, the suits might be commenced. And if the law of 1854 had been passed before the suit was instituted, we do not understand that any objections would have been made to it. The objection is that it was passed after the suit was instituted, and contained regulations with which the plaintiff could not conveniently comply. But the prior law was not a contract. It was an ordinary act of legislation, prescribing the conditions upon which the State consented to waive the privilege of sovereignty. It contained no stipulation that

these regulations should not be modified afterwards, if, upon experience, it was found that further provisions were necessary to protect the public interest; and no such contract can be implied from the law, nor can this court inquire whether the law operated hardly or unjustly upon the parties whose suits were then pending. That was a question for the consideration of the legislature. They might have repealed the prior law altogether, and put an end to the jurisdiction of their courts in suits against the State, [fol. 138] if they had thought proper to do so, or prescribe new conditions upon which the suits might still be allowed to proceed. In exercising this latter power the State violated no contract with the parties; it merely regulated the proceedings in its own courts, and limited the jurisdiction it had before conferred in suits when the State consented to be a party defendant.' "

Now the question occurs, if a State restricts its suability or the suability of its Treasurer or other officer as such, why may it not likewise restrict the suability of its Commission from whom it has withheld corporate capacity?

I think the judgment of the District Court should have been affirmed.

[fol. 139] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 7793

UTAH CONSTRUCTION COMPANY, a Corporation, Plaintiff in Error,

vs.

THE STATE HIGHWAY COMMISSION OF WYOMING, Consisting of Hyrum Lingle, G. D. O'Neil, S. W. Conwell, J. M. Snyder, and Francis Johnstone

In error to the District Court of the United States for the District of Wyoming

JUDGMENT—Dec. 21, 1927

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Wyoming, and was argued by counsel.

On consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that the Utah Construction Company, a Corporation, have and recover against The State Highway Commission of Wyoming, Consisting of Hyrum Lingle, G. D. O'Neil, S. W. Conwell, J. M. Snyder, and Francis Johnstone, the sum of———— Dollars for its costs in this behalf expended, to be collected according to law.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions to set aside the order dismissing the complaint.

[fol. 140] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 141] In Supreme Court of the United States

Order Allowing Certiorari—Filed April 23, 1928

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 33,304. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 96. The State Highway Commission of Wyoming, consisting of Hyram Lingle, T. D. O'Neil, et al., petitioner, v. Utah Construction Company. Petition for a writ of certiorari and exhibit thereto. Filed March 20th, 1928. (33,304.)